87-703 (1)

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Do the Fourth, Fifth and Sixth Amendments prevent the Government from seizing prior to trial, and thereafter retaining, a defendant's private property that is concededly unrelated to any offense and is needed to pay counsel?

2. Under this Court's decisions in *United States* v. *Rauscher*, 119 U.S. 407 (1886), and *Johnson* v. *Browne*, 205 U.S. 309 (1907), may an extradited defendant challenge the legality under U.S. law of his extradition?

3. Is restitution under 18 U.S.C. § 3651 limited to payments to persons who are adjudicated victims?

4. Are the Fifth and Eighth Amendment rights of an alien defendant, and applicable statutes, violated when after prison he is detained in the United States in spite of findings that he has relinquished control of sufficient assets to pay restitution, that he is now consequently a pauper, and that "no further probationary purpose is to be served" by detaining him any longer?

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on September 3, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit issued April 10, 1987 is reported at 814 F.2d 1329 and is reproduced at Appendix B. The amendments to that opinion issued by the Court of Appeals on petition for rehearing are reproduced at Appendix A; they are incorporated in a revised version of the amended opinion at 827 F.2d 424. The oral opinion of the District Court refusing to return petitioner's property after trial is reproduced at Appendix F.

JURISDICTION

The first judgment of the Court of Appeals was entered April 10, 1987. A timely petition for rehearing was filed April 20, 1987. The order entering an amended

opinion and judgment and otherwise denying rehearing was entered September 3, 1987. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The Fourth, Fifth, Sixth and Eighth Amendments to the Constitution of the United States, 18 U.S.C. § 3651, Rule 41(e), Fed. R. Crim. P., and pertinent portions of the Treaty of Extradition with Switzerland are reproduced at appendix K.

STATEMENT

This petition is limited to four aspects of a federal criminal proceeding. Petitioner, a Belgian, was for thirty years a real estate broker in Brussels. As the District Court observed, previously he "never has been in trouble." R. 1023. He was extradited from Switzerland while on a business trip there and tried in the United States District Court for the Central District of California at a jury trial presided over by the Honorable A. Andrew Hauk, Senior United States District Judge. Petitioner was convicted along with two Americans (Alan Blair and another) on two charges: one count of wire fraud (18 U.S.C. § 1343), and one count of causing interstate transportation of a victim of fraud (18 U.S.C. § 2314). The allegation was that petitioner had encouraged the owner of a Belgian brokerage house, Roger Biard, to lend money to a partnership formed by Blair, secured by a Kansas real estate mortgage which proved to have no value. The borrowers repaid $800,000 of Biard's $1,000,000 loan, but $200,000 remained unrecovered. After Blair told Biard he was unable to repay the balance, and after a judge in Switzerland (where Biard's funds had passed) declined to act on Biard's complaint, Biard contacted U.S. prosecutors, who obtained a federal indictment.

At trial the objective facts with respect to petitioner were virtually undisputed. The issue as to him was state

of mind—whether, in encouraging Biard to invest with Blair, petitioner had been an accomplice of Blair, or instead had been simply another of many people whom the Government sought to prove Blair had fooled. The trial court, although it had called the prosecution's case a "house of cards," R. 762,[1] allowed the case to go to the jury, which after three days of deliberations resolved the issue against petitioner. Denying post-trial relief, the court commented that "He had an excellent reputation and character but they still came in with a conviction." R. 1020. Petitioner received a lighter sentence than the other two defendants, and was immediately released from prison, where he had spent more than a year in pretrial confinement. However, he was put on probation and ordered to remain in the United States until he paid restitution to Biard of $34,501.26, plus additional restitution to a trial witness in the amount of $458,373.89. P. 35a, *infra*.

On appeal, petitioner challenged *inter alia* the legality of the Government's pretrial seizure and continuing retention of his life's savings, that prevented him from paying for his defense or supporting his minor children; the legality of his extradition itself; the trial court's order that he pay over $458,000 to a non-victim trial witness; and the legality of the court's order forbidding him to leave the United States until all restitution had been paid. The Ninth Circuit affirmed on the first three points and did not rule on the last, instead simply remanding the sentence condition to the District Court to reconsider. P. 24a, *infra*. On petition for rehearing, the Court of Appeals after five months issued several pages of additions and deletions amending its opinion, but entered the same judgment. Pp. 1a-5a, *infra*. The

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[1] Near the end of the trial the court commented that "all of my notes show that Blair and Bilton are the only two involved in this," and added, "I know the government is getting very close to the end of the rope . . . ." R. 861, 872. Citations to "R." are to the record in the Court of Appeals.

four holdings for which certiorari is sought are summarized here in turn.

A. Taking of Property.

Petitioner lived and worked all his life in Brussels, Belgium, and kept his savings in nearby Switzerland. Petitioner's savings were invested in stock in two closely-held Panamanian companies that owned Spanish real estate, called Abamar Corporation and Batimar Corporation. He kept his two stock certificates, worth over $1 million, along with clients' deeds from his real estate business and some personal items, in a safe deposit box at a bank in Geneva. The two stock certificates, the undisputed record established and the Court of Appeals acknowledged, p. 22a n.6, *infra*, had remained dormant since 1973, six years before any acts or offenses charged in the indictment. They concededly had nothing to do with any offenses charged.

At the time of petitioner's extradition, U.S. prosecutors, with no factual support or probable cause, repeatedly asserted to the Swiss authorities that the two certificates were fruits or evidence of the crimes charged.[2] They demanded that the contents of his safe deposit box

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[2] For example, a U.S. State Department official told the Swiss police:

> "We have traced these funds to van cauwenberghe's account at credit suisse and we believe that he may have invested some or all of this money in companies held on his behalf at fides societe fiduciare. Fides has held, in trust for van cauwenberghe, ownership interests in hexagonal valley, batimar and abamar.
>
> "Because they constitute assets that were involved in the scheme or may have received scheme proceeds, we ask that any shares in these companies or in any other entities held for van cauwenberghe at fides be frozen so that they may be delivered up with van cauwenberghe at the time of extradition." R. 85.

The Government never made those allegations in any U.S. court and never attempted to support them.

be handed over to U.S. prosecutors along with petitioner himself. After hesitating, the Swiss complied. Then, reconsidering the initial seizure, a Swiss court ordered one of the certificates released as not covered by the treaty, which authorizes seizure only of items on the accused's person or evidence of the crime. R. 83-84. But the U.S. officials protested, and assured the Swiss that the U.S. Government had cause to believe that petitioner's assets were the fruit of the alleged 1979 crime. R. 85. The Swiss reinstated the seizure, R. 86-87, and delivered petitioner's two stock certificates to U.S. officials, who transmitted them to prosecutors in Los Angeles.

Petitioner in the U.S. District Court challenged the Government to demonstrate any right to his property, and also explained that he needed to sell or pledge these assets in order to pay counsel and defend himself. The Government, abandoning all its earlier representations to the Swiss, declined to assert in a U.S. court that it had ever had any basis to say that this property was either evidence or fruit of any crime at all. But it also refused to give the property back. Petitioner formally moved under the Fourth, Fifth and Sixth Amendments and Rule 41(e) of the Federal Rules of Criminal Procedure that his property be returned to him. The Government then for the first time asserted that

> "the Court possesses inherent authority by virtue of its broad equity powers to hold these assets pending resolution of the criminal charges against Van Cauwenberghe." R. 107.

Petitioner's counsel protested that "Mr. Van Cauwenberghe needs this money to defend himself," R. 277uu—not only to pay retained counsel, but also to pay substantial expenses of interviews and investigation in Europe and transportation of defense witnesses from Belgium. The District Court replied, "You want to get ahold of the stock so he has got something to pay attorneys fees with. . . . Try to get it." R. 288. The Court concluded:

> "knowing that there is a victim out there wanting part of that property, do you think I am going to give it back to Van Cauwenberghe? Whether the government has an interest or not, I wouldn't do it." R. 286.

After the trial, petitioner renewed his request that the property—found to be worth over $1,000,000, more than $500,000 more than the restitution ordered—be returned to him. The District Court, exclaiming that "I am going to make case law," refused. The court directed that the certificates be turned over jointly to the prosecutor and to petitioner's attorney with instructions to liquidate them as soon as possible and return the proceeds to the District Court. Pp. 29a-32a, *infra*. Petitioner appealed both the initial seizure and the continued retention, again claiming violation of the Fourth, Fifth and Sixth Amendments.

The Court of Appeals acknowledged that "the district court may have been under a duty to return property that neither was contraband nor had any evidentiary value." P. 22a, *infra*. However, the Court of Appeals held, no such duty applied here, because it said that although petitioner remained "the beneficial owner" p. 4a, *infra*, nevertheless by complying with the District Court's order to transfer custody of the stock to his attorney and the prosecutor to assure the proceeds would be remitted to the court after sale, petitioner had abandoned the interest necessary to have his constitutional claim heard on appeal.[3] Accordingly, the Ninth Circuit affirmed the District Court and denied any relief.

B. Extradition.

The Government obtained petitioner's presence for trial by extradition from Switzerland, invoking the 1900 extradition treaty with that country, 31 Stat. 1928, which allows extradition for "obtaining money or other

[3] The Government had never made such an argument, but adopted it in response to petitioner's petition for rehearing.

property by false pretences." Petitioner moved to dismiss in the District Court on the ground that the two offenses with which he had been charged—wire fraud (18 U.S.C. § 1343) and causing interstate transportation of a victim of fraud (18 U.S.C. § 2314) [4]—were not among the limited offenses made extraditable by the treaty, and that indeed the fact they were not had been officially acknowledged by the Departments of State and Justice for many years. He placed in the record statements of the Attorney General and the Secretary of State themselves so stating, and other official documents to the same effect. See pp. 39a-42a, *infra*.

In addition, petitioner submitted uncontroverted government documents showing that U.S. officials in order to obtain his extradition had repeatedly told the Swiss authorities that he had been indicted for "fraud" or "false pretenses," that they had caused pressure to be brought to bear on the Swiss judiciary, and that they had falsely told the Swiss that conviction of the offenses with which he was charged required inducement, reliance, and the surrender of something of value—the basic elements of false pretenses or fraud. The Government's only response was that its inaccurate statements to the Swiss (which were never denied) were irrelevant, because the Swiss had been furnished with the texts of 18 U.S.C. §§ 1343 and 2314 and therefore should be able to discern for themselves the elements of those U.S. crimes. The District Court denied petitioner's motion summarily.

The Court of Appeals never discussed the misrepresentations or the scope of the treaty at all. Instead, it broadly held that petitioner could not be heard in a court of this country to complain about violations of law connected with his extradition. Adopting the Government's words, it said the issue "is within the sole purview of the

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[4] The Swiss denied extradition for a charge of conspiracy, 18 U.S.C. § 371

requested state," and "[w]e therefore defer to the Swiss Federal Tribunal's decision as to Van Cauwenberghe's extraditability . . . ." Pp. 13a, 14a, *infra*. It made no reference at all to the leading case on which petitioner had relied, *United States* v. *Rauscher*, 119 U.S. 407, 430 (1886), which held that a defendant who has been extradited "can only be tried for one of the offences described in that treaty."

C. Restitution Order.

The Court of Appeals described the charge for which petitioner had been indicted as participating in "a scheme to defraud Roger Biard, a Belgian investment broker, and a Belgian corporation owned by members of the Vanden Stock family." P. 7a, *infra*. Therefore, petitioner argued on appeal, although the probation statute permitted the order of $34,000 restitution to Biard, the District Court had authority to order payment of more than ten times that amount—over $458,000—to a witness at the trial who was involved in counts never tried and later dismissed, and who by his own testimony had not lost anything. That witness, Roger Vanden Stock, testified that the Vanden Stock corporation alleged to have lost its investment was owned by his father; and because the District Court specifically limited trial to two counts involving Roger Biard, the jury never was instructed regarding any Vanden Stock counts. Petitioner relied on cases from six circuits holding that except as part of a plea bargain, restitution under 18 U.S.C. § 3651 cannot be ordered paid except to a person who has been adjudicated a victim. The Court of Appeals mentioned none of those cases and affirmed the award.

D. Exile.

Petitioner is a widower with three children left behind in Brussels. The record shows that since he was arrested and his assets seized, his children, except for one daughter who in his absence married, have had to subsist on charity and gifts from relatives. When he requested ex-

pedited relief from the sentence that required him, even though he had fully served his prison term, to remain in the United States, R. 36a, a motions panel of the Ninth Circuit remanded to the District Court with a direction to make a finding whether there was any further reason to forbid him to go home to his family. P. 27a, *infra*. The District Court then made a specific finding that "no further probationary purpose is to be served by retaining defendant Van Cauwenberghe in the United States." P. 38a, *infra*. Nevertheless, it refused to order him released. Then the three different judges who composed the merits panel of the Court of Appeals did not address at all petitioner's argument that to continue to hold him was on its face unauthorized by law. Instead, without mention of his legal contentions, the court simply remanded to the District Court to consider once more. (Thereafter, the District Court again refused to change its order, saying that even though petitioner had assigned control of his assets, it would not permit him to return home until they had been fully liquidated and all the proceeds paid into the court; full payment may not be possible for years.) Petitioner remains in the United States, separated from his family and not allowed to work.

REASONS FOR GRANTING THE WRIT

Although other substantial errors were committed during petitioner's trial,[5] they are not presented here be-

[5] The atmosphere of the trial was dominated by the District Judge's unique manner, comments and rulings. The trial record is punctuated, for example, with such statements from the Bench as: (on evidence) "Anything and everything comes in," R. 229; (on objections) "I said—shut up. . . . I think you are all cracked on this case," R. 511; "I am going to shut you up. You remind me of Santa Claus Number Two," R. 775; (on scope of inquiry) "I suppose I wouldn't let them try to find out . . . whether or not he masturbates," R. 315-16; (on decorum) "I almost sent that one kid [a defense attorney] yesterday to the dungeon for interrupting me," R. 271; (to female defense counsel) "Yes, my dear," R. 466; (on rape victims) "the man didn't get anything from her, except

cause they do not create conflicts in the circuits or otherwise meet the standards of this Court's Rule 17. This petition is confined to four rulings of law which the Court of Appeals allowed to stand that do raise such conflicts. One of these—tolerating the continuing enforced unlawful exile of a father from his children—violates this Court's decisions and is unspeakably cruel. Another—allowing the assertion of "inherent authority" to seize and hold a defendant's property needed for his defense—is a fundamental challenge to the rule of law in an adversary system.

I. DECISIONS OF OTHER CIRCUITS AND OF THIS COURT FORBID THE TAKING OF A DEFENDANT'S PROPERTY THAT IS UNRELATED TO ANY OFFENSE.

A. To Permit Seizure and Retention of Private Property Needed to Pay for Legal Defense Is in Direct Conflict with Recent Decisions of the Fourth and Fifth Circuits.

Whether prosecutors have power to seize, and trial courts to withhold, a defendant's assets that are needed to pay counsel and for other costs of defense, is an issue that for three years has been roiling the lower courts. Nearly every federal court which has addressed the question has ruled, by statutory construction or constitutional holding, that even when (unlike here) the Government claims to have acquired authority for such a seizure from forfeiture provisions of recent acts of Congress, nevertheless the Fifth and Sixth Amendments deny such power.

Over the past year this basic constitutional question of prosecutorial power has reached the court of appeals

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if you want to put it crudely, a good piece," R. 192; (on the Federal Rules of Criminal Procedure) "They [federal judges] don't look at them. The Chief Justice will be the first one to tell you that," R. 277y; (on denying testimony from the only corroborating witness) "I don't see a problem. . . . Mr. Van Cauwenberghe has his own testimony," R. 323, 325.

level, and has been decided in two circuits prior to the present case. Both the Fifth and Fourth Circuits rejected the Government's assertion with forceful opinions. *United States* v. *Thier*, 801 F.2d 1463 (5th Cir. 1986), *modified*, 809 F.2d 249 (5th Cir. 1987); *United States* v. *Harvey*, 814 F.2d 905 (4th Cir. 1987).[6]

The Ninth Circuit here, by contrast, has allowed a seizure of a defendant's assets, even though it was totally lacking even colorable statutory authority, to stand. Prior to trial, petitioner's counsel told the court, "The problem is Mr. Van Cauwenberghe needs this money to defend himself." R. 277uu. He explained that besides legal fees, "Each witness, who has got to be brought over to this country is going to cost several thousand dollars. Mr. Van Cauwenberghe needs this money for his defense, and he is being deprived of this property at this point without due process of law." R. 277yy.

Petitioner's motion relied on the Fourth and Fifth Amendments, as well as the Sixth Amendment's guarantee of "the Assistance of Counsel for his defense." The Government's response was bold, aggressive, and shocking. It made no assertion—as it could not—that the property was evidence, fruit of a crime, or forfeitable under any statute.[7] Instead, the Government told the District Court, it relied on "inherent" authority to seize

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[6] The Solicitor General did not seek certiorari in either case, even though the latter held an Act of Congress unconstitutional. The Government did seek and obtain a pending rehearing in *United States* v. *Caplin & Drysdale*, No. 86-5050 (4th Cir. 1987), one of the three cases decided *sub nom. United States* v. *Harvey*, in which the appellant was not a criminal defendant but rather a law firm, which the Government on rehearing argued *inter alia* had "no standing to complain." The Government did not seek review of the other two *Harvey* cases.

[7] Article XII of the extradition treaty allows seizure and delivery of "articles seized which are in the possession of the person

and hold an indicted person's assets. In the Government's words:

> "[T]he Court possesses *inherent authority* by virtue of its broad equity powers to hold these assets pending resolution of the criminal charges against Van Cauwenberghe." R. 107 (emphasis supplied).

Elaborating, the Government told the court:

> "It would be in keeping with this heightened regard for victim rights for the Court to exercise its *inherent powers* of equity and maintain these assets in the Registry of the Court until there has been a final disposition of the criminal charges against Van Cauwenberghe. By so doing, the Court would deny Van Cauwenberghe an opportunity to dissipate the assets prematurely. The Court thus would preserve its ability to impose restitution as part of its sentencing of Van Cauwenberghe in the event he is convicted of the charges in this case." R. 107 (emphasis supplied).

The District Court, amazingly, accepted the Government's claim of power, and denied petitioner's motion for return of the property. The District Court's response to petitioner was totally callous. The court replied, "you lawyers—you want the money—I know." The court chuckled that, "He's already got you on credit, so that's pretty good." R. 277uu-zz. The court concluded:

> "I know what your feeling is. You want to get ahold of the stock so he has got something to pay attorneys fees with. I know what it is all about. . . . Try to get it." R. 288.

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demanded, at the time of his arrest." See p. 50a, *infra*. The Secretary of State ruled that this treaty provision with Switzerland does not apply to "property not in the possession of the accused." Secretary of State Knox to Minister Ritter, Feb. 26, 1913, reprinted in 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 205-06 (1942); see also 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1061-62 (1968).

After the trial, the District Court announced that "I am going to make case law," R. 1007, and still refused to release the property, even though the court found that its value far exceeds the restitution amount. On appeal, the Ninth Circuit did not address petitioner's Fifth and Sixth Amendment claims, nor even mention the Fourth Circuit's supervening decision, to which he had called the court's attention. The Ninth Circuit simply chose to ignore those constitutional claims entirely.

What happened here is irreconcilable with the law in other circuits. The Fifth Circuit in *United States* v. *Thier*, *supra*, vacated an order freezing a defendant's assets (even though there, unlike here, they were claimed to be statutorily forfeitable) because the district court had failed to consider the possible need to exempt funds to pay counsel and support a family. The court recognized "defendant's need for living expenses and his right to the attorney of his choice," 801 F.2d at 1471, and held that "the government errs" in seeking to block "[e]xpenditures the defendant must make to keep himself and his dependents alive and to secure competent counsel," *id.* at 1474-75. Judge Rubin, concurring, further emphasized that

> "I would require the Government to submit proof that the accused will not be left without adequate means to retain vigorous counsel and to provide basic sustenance for himself and his dependants." 801 F.2d at 1477.[8]

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[8] Petitioner here, a widower, was ordered not to return to his home in Belgium, was allowed no funds to live on, is not allowed to work in the United States, and was left with no funds to support his children, who are in Brussels. As a result they and he have subsisted on charity and gifts from relatives and friends for more than two years. A different panel of the Ninth Circuit had examined petitioner's financial statements and found that as a result of the continuing seizure of his property he was qualified to proceed *in forma pauperis*. Pp. 25a, 26a, *infra*.

Similarly, the Fourth Circuit in *Harvey, supra*, announced:

> "[W]e hold that to the extent the [Comprehensive Forfeiture] Act authorizes freeze orders and property forfeitures whose effect is to deprive an accused of the ability to employ and pay legitimate attorney fees to private counsel to defend him against charges underlying the forfeiture, such applications violate the sixth amendment right to counsel of choice. *Cf. United States v. Thier*, 801 F.2d 1463, 1477 (5th Cir. 1986) (Rubin, J., concurring specially) (Act violates substantive due process where all assets frozen)." 814 F.2d at 926.

Holding that such takings violate both the Fifth and Sixth Amendments, it approved several district court decisions in several circuits to the same effect.[9]

Under the law announced by the Fourth and Fifth Circuits, petitioner was and is entitled to return of his property in order to pay counsel, and indeed to continue with paid retained counsel in this Court. Petitioner was,

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[9] *E.g., United States* v. *Badalamenti*, 614 F. Supp. 194, 198 (S.D.N.Y. 1985) (seizure of funds for bona fide attorneys' fees would "run afoul of the Sixth Amendment"); *United States v. Rogers*, 602 F. Supp. 1332, 1350 (D. Colo. 1985) (if such seizure were allowed, "the prosecutor could exclude those defense counsel which he felt to be skilled adversaries"); see also *United States* v. *Nichols*, 654 F. Supp. 1541, 1559 (D. Utah 1987) ("Our system of justice simply cannot tolerate government actions that render defendants indigent and thus unable to employ counsel of choice"); *United States* v. *Estevez*, 645 F. Supp. 869, 871 (E.D. Wis. 1986) ("In my view, the most serious of the many effects of the forfeiture of attorney fees is that by tampering with the right to counsel, the statute undermines our traditional adversary system of justice. It places in the hands of the prosecution a tool capable of crippling its adversary."). Even what district court authority exists to the contrary rested on the assumption, indisputably negated here, that the assets seized were "the illgotten gains of criminal activity." *United States* v. *Draine*, 637 F. Supp. 482, 484 n.2 (S.D. Ala. 1986).

moreover, denied the kind of trial guaranteed by both the Fifth and Sixth Amendments because the taking away of his only funds made it impossible for him to undertake the heavy expenses of taking depositions abroad and calling witnesses from his home in Belgium for his defense.[10]

Interfering with an accused's most fundamental right to defend himself, by simply taking away all his assets—an interference the Government defended as based on "inherent authority"—is an utterly gross constitutional violation. As the District of Columbia Circuit through Judge MacKinnon observed:

> "the Sixth Amendment's protection of the right to the assistance of counsel is that a defendant must be afforded a reasonable opportunity to secure counsel of his own choosing. As the Supreme Court stated in *Powell v. Alabama*, 287 U.S. 45 . . . (1932), '[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.' 287 U.S. at 53 . . . . An accused who is financially able to retain counsel must not be deprived of the opportunity to do so." *United States* v. *Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) (footnote omitted).

That undersigned counsel continued to represent petitioner does not avoid the constitutional issue. Petitioner's assets, more than double the restitution amount, are still held. Moreover, the Fourth Circuit held in *Harvey*,

> "we reject any suggestion that by continuing their representation, counsel effectively mooted or waived derivatively any claim of denial of counsel of choice. Under the circumstances, counsel resolved an ethical

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[10] Five character witnesses traveled from Brussels to Los Angeles to testify for petitioner entirely at their own expense. Others did not. Although the court ordered that a Belgian witness whom petitioner wished to call be deposed in Brussels, petitioner was unable to do so because of the costs of multiple counsel for such a proceeding.

dilemma by remaining in the case at considerable financial risk, in order, among other things, to challenge the forfeiture provisions. We will not hold that this resolution made the constitutional claim, timely raised, no longer justiciable." 814 F.2d at 929 n.11.

The Ninth Circuit has not only failed to honor constitutional doctrine applied elsewhere; more importantly, it tolerates a continuing unconstitutional governmental deprivation of property that goes to the very integrity of this country's judicial system. The Fourth and Fifth Circuits have it right. The Ninth Circuit has it wrong. This Court should settle the matter, and assure that what happened to this petitioner can never happen to a defendant in a United States courtroom again.

B. Taking of Private Property Unrelated to Any Offense Exceeds Executive Power, Violates the Fourth and Fifth Amendments, and Conflicts with Decisions of This Court and of Three Other Circuits.

1. This Court's Most Basic Decisions Hold that Private Property May Not Be Seized and Retained Without Statutory Authority.

Even apart from the interference with criminal defense, it seems too clear for extended discussion that this Court's decisions do not countenance any such "inherent" governmental power to seize private property as was invoked here. The Court of Appeals acknowledged that

> "The stock certificates were not used as evidence, and nothing in the record indicates that they had any connection with the crimes committed or alleged. Indeed, the record shows that the certificates had remained dormant since 1973, well before the fraudulent scheme commenced." P. 22a n.6, *infra.*

The District Court's view was that none of that mattered:

> "THE COURT: . . . [K]nowing that there is a victim out there wanting part of that property, *do you think I am going to give it back to Van Cauwenberghe? Whether the government has an interest or not, I wouldn't do it.*" R. 286 (emphasis supplied).

And after the trial, although the stock certificates' adjudicated value of over $1 million far exceeded the ordered restitution of $493,000, the court still refused to free any part of those assets, explaining that "I am going to make case law." P. 31a, *infra*.

What the case law emphatically holds, however, is that in the absence of a valid statute, the Government has no "inherent" power to seize and retain private property. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Petitioner's property is a good deal more humble than a steel mill, but the constitutional principle is the same.

What the case law further holds is that the Fifth Amendment provides each person "the right to be free from unauthorized actions of government officials which substantially impair his property interests." *Greene* v. *McElroy*, 360 U.S. 474, 493 n.22 (1959). Not only does the Takings Clause of the Fifth Amendment prevent what happened here, but "[a]ny significant taking of property by the State is within the purview of the Due Process Clause." *Fuentes* v. *Shevin*, 407 U.S. 67, 86 (1972).

To hold as the Ninth Circuit here did that because petitioner's current ownership of the stock is beneficial rather than titular, he therefore cannot assert a constitutional right to have that property released by the Government, borders on the ridiculous. The Ninth Circuit's view cannot be reconciled with any decision of this Court. On the contrary, this Court has held that "the types of interest protected as 'property' are varied and, as often as not, intangible, relating to 'the whole domain of social and economic fact.'" *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (citing many cases and quoting in part *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)); see also, *e.g.*, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (right to

sue is a property interest). Countless court of appeals decisions recognize that even where there is a statute authorizing forfeiture, the right to seek recovery "extends to any person or party having a *legally recognized interest* in the [seized item], whether he is owner or lienholder, and whether that interest is legal or equitable in nature." *United States* v. *$364,960 in U.S. Currency*, 661 F.2d 319, 326 (5th Cir. Unit B 1981) (emphasis in original) (citing many cases and quoting *United States* v. *One 1961 Cadillac Hardtop Automobile*, 207 F. Supp. 693, 698 (E.D. Tenn. 1962)).

2. *The Court of Appeals' Refusal To Hear Petitioner's Fourth Amendment Claim Violates This Court's Holdings in* United States *v.* Salvucci *and* Rakas *v.* Illinois *and Conflicts with Holdings of the Fifth, Sixth and D.C. Circuits.*

In choosing to ignore petitioner's Fifth and Sixth Amendment claims for return of his property, the Ninth Circuit treated the constitutional issue as limited to the Fourth Amendment and Rule 41(e) of the Federal Rules of Criminal Procedure. But even as a matter only of Fourth Amendment law, the Ninth Circuit's denial of relief was totally at odds with clear decisions of this and other courts.

The Ninth Circuit acknowledged that "There is no dispute that Van Cauwenberghe was the rightful owner of the property at the time it was seized from his Swiss bank accounts." P. 21a, *infra*. And it acknowledged that "Van Cauwenberghe remains the beneficial owner of the assets and any proceeds derived from their sale." P. 4a, *infra*. In fact, the Court of Appeals did not even attempt to defend what the Government and the District Court had done here. It acknowledged that "the district court may have been under a duty to return property that neither was contraband nor had any evidentiary value." P. 22a, *infra*. Indeed it was. That duty is plain beyond dispute. *E.g.*, *United States* v. *Wil-*

son, 540 F.2d 1100, 1101 (D.C. Cir. 1976) ("We hold that the district court has both the jurisdiction and the duty to ensure the return of such property").[11]

In spite of this, the Ninth Circuit held that petitioner's constitutional claim would not be heard because control and titular record ownership had been transferred to his attorney and the prosecutor at the Court's direction in order to expedite sale, after the Court had ordered that the property would not be returned to petitioner and that petitioner would not be allowed to leave the United States until all the nearly $500,000 restitution had been paid. Pp. 29a-32a, *infra*. The Ninth Circuit threw out all of petitioner's constitutional claims because of the transfer of record title. It held that although he remained the

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[11] The illegality under the Fourth Amendment and the applicable extradition treaty of the initial unauthorized seizure and retention was undeniable, there being no warrant and not even a claim of probable cause. *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978); *Warden* v. *Hayden*, 387 U.S. 294 (1967). That the initial warrantless seizure was effected through reluctant foreign authorities who the record established considered themselves "bound by the explanations provided by the United States Department of Justice," R. 93, does not alter the Fourth Amendment violation. *United States* v. *Mount*, 757 F.2d 1315 (D.C. Cir. 1985); *United States* v. *Morrow*, 537 F.2d 120, 139 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977); *Berlin Democratic Club* v. *Rumsfeld*, 410 F. Supp. 144, 155 (D.D.C. 1976).

After the trial, there was an additional obligation to return the seized property, as recognized in some of the very cases cited by the Court of Appeals. *Sovereign News Co.* v. *United States*, 690 F.2d 569 (6th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983), in fact distinguished the *King* case, on which the court here relied, and held that "Where the former defendant in criminal proceedings can show a property interest in the copies, the government must return them." 690 F.2d at 577. And *United States* v. *Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), held that "Property unlawfully seized must on motion be promptly returned . . . unless it be contraband or statutorily forfeit" and "Jurisdiction to return is not dependent upon whether the matter falls within the compass of Fed. R. Crim. P. 41(e)." 650 F.2d at 303 nn.26,27. See also *United States* v. *Farrell*, 606 F.2d 1341 (D.C. Cir. 1979).

beneficial owner, "Van Cauwenberghe can no longer demonstrate that he is entitled to lawful possession of the property," and therefore, under the Court of Appeals' novel construction of the Fourth Amendment and Rule 41(e), Fed. R. Crim. P., he simply was out of luck, and the court would give him no relief. P. 22a, *infra*.

When petitioner in some astonishment sought rehearing, the Court of Appeals added a lengthy amendment to its opinion, pp. 1a-5a, *infra*, citing as authority for rejecting petitioner one of its decisions holding that a criminal defendant could not demand copies of transcriptions prepared by the Government of his telephone conversations. *United States* v. *King*, 528 F.2d 68 (9th Cir. 1975).[12]

This totally unprecedented holding—which was not briefed by the Government or mentioned at oral argument—not only ignores the Fifth and Sixth Amendment interests asserted, but flies in the face of this Court's repeated holdings that in motions to return illegally seized property, the Fourth Amendment is to be applied in a common-sense and non-technical way. The plain language of Rule 41(e) itself applies to "A person aggrieved by an unlawful search and seizure"—not limited, as the Ninth Circuit would have it, to one holding legal,

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[12] The court of appeals on rehearing also added for the first time, while disclaiming that "we express no view," that perhaps the assets were subject to an *ex parte* civil attachment in another case issued weeks after they had left the jurisdiction. However, the only cases the court cited all involved *perfected* attachments *by the Government* for taxes, and rested on the observation that, as one of them put it, "A defendant's motion for return of property will be unavailing where *the government* has a continuing interest in the property." *United States* v. *Francis*, 646 F.2d 251, 263 (6th Cir.), *cert. denied*, 454 U.S. 1082 (1981) (emphasis supplied). Moreover, the *ex parte* order from a civil case to which the court referred was a nullity under California law because of the pending proceeding, see Cal. Civ. P. Code § 488.475(b), and also because it was filed several weeks after the property in question had been taken out of the jurisdiction for sale; the order was never executed because no property remained in the jurisdiction to attach.

as opposed to beneficial, title. Moreover, this Court time and time again has warned that Fourth Amendment interests are not to be evaluated according to cramped compartments of property law. "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated . . . property rights are neither the beginning nor the end of this Court's inquiry." *United States* v. *Salvucci*, 448 U.S. 83, 91 (1980). "[A]rcane distinctions developed in property and tort law . . . ought not to control." *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978). "*Rakas* emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment." *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980).

Not only is the Ninth Circuit's ducking of the issue impossible to square with those holdings of this Court. It is also in conflict with decisions in other circuits that have heard Fourth Amendment claims under the same federal rule where the technical property-law interests were far less plain than here. *E.g.*, *United States* v. *Haydel*, 649 F.2d 1152, 1154 (5th Cir. 1981) ("Haydel had a legitimate expectation of privacy for records secreted in his parents' home and under their bed"); *United States* v. *Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976) (even after guilty plea, the court after trial "has both the jurisdiction and the duty to return the contested property here regardless and independently of the validity or invalidity of the underlying search and seizure"). The Constitution protects "any significant property interest." *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971). If constitutionally guaranteed safeguards of property are to be disregarded as casually as the Ninth Circuit did here, in the face of this Court's decisions, then that unprecedented sophistry in itself calls for grant of certiorari.[13]

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[13] Any suggestion that petitioner intended to waive his constitutional rights is contradicted by the record. The order transferring custody, p. 33a, *infra*, was prepared at the District Court's direction

II. THE CIRCUITS ARE IN CONFLICT AS TO WHETHER AN EXTRADITED PERSON MAY CHALLENGE THE LEGALITY OF HIS EXTRADITION.

The issue whether an indicted defendant's assets can be seized without any legal authority is so fundamental that it nearly overshadows another ruling of the Court of Appeals here that by itself fully merits grant of certiorari to settle the law among the circuits and clarify what is tolerated in the administration of justice. The unresolved question is this: may an extradited person challenge jurisdiction after an extradition that is contrary to treaty?

The Second Circuit, applying this Court's seminal decision in *United States* v. *Rauscher*, 119 U.S. 407 (1886), follows the rule that it is a "rule of domestic law that the courts of this country will not try a defendant extradited from another country on the basis of a treaty obligation for a crime not listed in the treaty." *Shapiro* v. *Ferrandina*, 478 F.2d 894, 905 (2d Cir.) (Friendly, J.), *pet'n for cert. dismissed*, 414 U.S. 884 (1973); *accord*, *Fiocconi* v. *Attorney General*, 462 F.2d 475, 479 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972) ("[f]or the United States to try him for the unextraditable offense was thus a breach of the treaty"). The same rule is followed in the Eighth Circuit. *United States* v. *Thirion*, 813 F.2d 146, 151 n.5 (8th Cir. 1987) ("The government's argument that Thirion lacked standing to complain of a vio-

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and agreed upon as to form, after the court had refused to return the property and directed over objection that it be placed in joint custody of petitioner's attorney and the prosecutor. See pp. 29a-32a, *infra*. Moreover, petitioner was (and is) being held hostage in the United States by the District Court as an additional way of enforcing its order. See pp. 24a, 36a, *infra*. "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (footnotes omitted), quoting *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937), and *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

lation of the treaty is without merit"). The Eleventh Circuit also recognizes that "[u]*nless a defendant can . . . establish a treaty violation*, she or he may not object to trial in the United States." *Jaffe* v. *Smith*, 825 F.2d 304, 307 (11th Cir. 1987) (emphasis supplied). The same rule is followed in the Tenth Circuit. *United States* v. *Vreeken*, 603 F. Supp. 715, 717 (D. Utah 1984) ("the defendant can successfully challenge the court's jurisdiction over his person if he is before the court in violation of an international treaty"), *aff'd*, 803 F.2d 1085 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 955 (1987).

The Ninth Circuit here, however, held exactly the opposite. Even though the record showed a treaty violation without dispute—the highest U.S. authorities had acknowledged that this treaty did not cover these offenses, pp. 39a-42a, *infra*, and there was also uncontroverted evidence that U.S. prosecutors had actively misled the Swiss as to the nature of the offenses charged [14]—nevertheless the Ninth Circuit held that petitioner would not be heard to complain. It held:

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[14] U.S. prosecutors told the Swiss authorities that extradition was based on "[f]raud and related offenses by Article II(6) of the treaty." R. 140. They (inaccurately) stated in writing to the Swiss authorities that "the offense of fraud, in violation of Title 18, United States Code, Sections 1343, is committed when the offender *induces another person to give up something of value* in *reliance* upon statements that the offender makes, knowing them to be untrue, and uses the United States mails in the process," R. 142 (emphasis supplied), and that "the indictment in the United States charges Wilfried VAN CAUWENBERGHE with an act of fraud in Los Angeles, California," R. 143, and that after extradition he would "face trial on charges of fraud," R. 41. At the same time, the prosecutors were filing pretrial papers in the U.S. District Court in Los Angeles that (accurately) stated that wire fraud "is not limited to the common-law definition of false pretenses," R. 128, and that the offense "requires only a 'scheme to defraud' and *not the success of the fraud*," and that "it is *not incumbent upon the Government to allege or prove actual reliance by or injury* to the victim," R. 134 (emphasis supplied).

> "We therefore defer to the Swiss Federal Tribunal's decision as to Van Cauwenberghe's extraditability under the Treaty . . . ." P. 14a, *infra*.

The Third Circuit has taken the same view as the Ninth, so there is a basic disagreement among the courts of appeals. *McGann* v. *U.S. Board of Parole*, 488 F.2d 39 (3d Cir. 1973), *cert. denied*, 416 U.S. 958 (1974).

The Ninth Circuit's position that a defendant will not be heard to assert such a defense in a U.S. court—a defense based a treaty which as a matter of "domestic law," *Shapiro* v. *Ferrandina*, *supra*, is the law of this land—was long ago rejected by this Court. In *United States* v. *Rauscher*, *supra*, this Court through Mr. Justice Miller held that a defendant extradited to the United States under a treaty *can* challenge under the treaty whether the offense he is to be tried for is an extraditable one. He "can only be tried for one of the offences described in that treaty." 119 U.S. at 430.[15] *Rauscher* has been the leading extradition case ever since, and often followed. *E.g.*, *Cook* v. *United States*, 288 U.S. 102, 121-22 (1933) (Brandeis, J.).

The Ninth Circuit's opinion here failed even to acknowledge the existence of *Rauscher* and the cases from other circuits following it—even though these were repeatedly urged by petitioner in briefs, oral argument, and again in petition for rehearing. The court of appeals confined its discussion to *Johnson* v. *Browne*, 205 U.S. 309 (1907), which it concluded—while conceding that the language on which it relied could be read otherwise—"precludes any review of the . . . [foreign] court's decision as to the extraditable nature of the offense." P.

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[15] The same is not true for a defendant brought to this country not under a treaty but by extra-legal force; but as Mr. Justice Miller distinguished the two cases in *Ker* v. *Illinois*, 119 U.S. 436 (1886), decided the same day as *Rauscher*, if a defendant is brought here by treaty, then he "came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him." 119 U.S. at 443.

14a, *infra*, quoting *McGann*, *supra*. Yet *Johnson* v. *Browne* explicitly followed *Rauscher*, and affirmed the release on *habeas corpus* of an extradited defendant convicted of an offense not covered in the applicable extradition treaty. This Court there explained:

> "Although the surrender has been made, it is still our duty to determine the legality of the succeeding imprisonment, which depends upon the treaty . . . ." 205 U.S. at 317.

The issue could not be framed more sharply than in this case, because the record here contains documents in which both the Attorney General and the Secretary of State acknowledged that the 1900 extradition treaty with Switzerland does not cover these offenses. See pp. 39a-42a, *infra*.[16] Review is particularly appropriate because the documentary record here also establishes that U.S. authorities repeatedly misled the Swiss by asserting that the offense for which petitioner was being sought was not the peculiar U.S. offense called wire fraud (which U.S. lawyers know requires only a scheme plus a wire trans-

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[16] The treaty allows extradition for "false pretences." See p. 48a, *infra*. Wire fraud, which is always recognized as an offense *in pari materia* with mail fraud, 18 U.S.C. § 1341, see, *e.g.*, *United States* v. *Gimbel*, No. 86-1808, —— F.2d —— (7th Cir. 1987), "is not to be confounded with the offense of obtaining money under false pretenses." *Schwartzberg* v. *United States*, 241 F.2d 348, 352 (2d Cir. 1917). Likewise, "it is evident that section 2314 cannot be properly interpreted to limit its application to the ancient statutory crime of obtaining property by false pretenses." *United States* v. *Benson*, 548 F.2d 42, 46 (2d Cir.), *cert. denied*, 430 U.S. 910 (1977). See also U.S. ATTORNEYS' MANUAL, § 9-15.220 (1977): "Many federal offenses are based upon the commerce clause of the constitution. Regrettably these offenses are not extraditable under most treaties. For example, the gravamen of a violation of 18 U.S.C. § 2314 is interstate transportation, not theft." The State and Justice Departments have been negotiating with Switzerland for at least six years in an unsuccessful effort to obtain a new treaty that would cover the offenses charged here. See ATTORNEY GENERAL OF THE U.S., ANNUAL REPORT 1982, 84.

mission),[17] but rather was "fraud." [18] The record also shows that at one point Swiss officials replied to a U.S. Justice Department request, "We are sorry but we really cannot, in this matter, put any more pressure on the Swiss Federal Tribunal." R. 42.[19]

This Court has not heard argument in a case involving international extradition since 1936. *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5 (1936). But that is not because international extradition has become less important. Rather, as Department of Justice officials have testified to the Congress, the number of cases involving international extradition has steadily increased, as individuals have become more mobile and international travel commonplace.[20] The lower courts have been left to interpret as best they can for modern international law enforcement the ambiguities and unanswered questions in this Court's extradition cases that date from around the turn of the Twentieth Century. The Ninth Circuit's opinion here, for instance, concluded that *Johnson* v. *Browne* can be read two ways—its, or petitioner's and the Second, Eighth, Tenth and Eleventh Circuits'. Petitioner's liberty and property depended on which was chosen.

Leaving such questions unanswered has not helped the administration of justice. Not only the courts, but enforcement officials as well have been left at large without clear limits. Some, as here, have overstepped. As a result, concern has been expressed more and more often about corners being cut by U.S. officials in order to obtain extradition. Professor Alona Evans, former President of the American Society of International Law,

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[17] See *Pereira* v. *United States*, 347 U.S. 1, 8 (1954).

[18] See note 14, *supra*.

[19] After, pursuant to court order, petitioner's counsel obtained copies of the documents referred to above, and while others remained unproduced, the District Court cut off any further discovery of documents relating to the extradition.

[20] See Hearings on H.R. 2643 Before the Subcommittee on Crime, Committee on the Judiciary, House of Representatives 34 (1983).

warned of "a 'frame of mind' in operating officials" handling extradition matters "whose zeal gets the better of their judgment." Evans, *Acquisition of Custody Over the International Fugitive Offender*, 1964 BRITISH YB. OF INTL. LAW 77, 102, 103. And a former State Department extradition official recently exploded what he called the widespread assumption "that the United States will not request extradition . . . when the pertinent extradition treaty does not cover the facts of the specific case;" he explains that "This may have been true in the past, but it is no longer accurate," and U.S. extradition officials now often use "extra-legal methods." Blakesley, *Extradition Between France and the United States*, 13 VAND. J. TRANSNATL. L. 653, 661, 680-81 (1980). It is past time for this Court to resolve the basic and frequently arising question whether U.S. courts in criminal proceedings are to apply the applicable extradition treaty, and also whether prosecutorial misrepresentations to obtain extradition will be tolerated.

III. AWARD OF RESTITUTION TO A NON-VICTIM CONFLICTS WITH DECISIONS OF THE FIRST, SECOND, THIRD, FIFTH, EIGHTH AND ELEVENTH CIRCUITS.

This extraordinary case creates another very sharp and simple conflict in the circuits as to a basic issue of criminal restitution law. The Ninth Circuit here approved a sentence under 18 U.S.C. § 3651, the federal probation statute, that required petitioner to pay over $458,000 to Roger Vanden Stock, a Belgian who had been allowed to testify for the Government at trial, even though as both courts below recognized the trial was limited to two counts alleging wire transfers and travel involving one Roger Biard. This was made even though (1) there had been no trial of the counts involving wires or travel related to Vanden Stock, and (2) the trial testimony—including Vanden Stock's own—established without dispute that Vanden Stock himself was only a witness and had not lost any money.

The Court of Appeals held that the order was proper because the overall scheme alleged in the two Biard counts included "the Vanden Stock family" as well, even though the jury was instructed that for conviction it need find only acts with respect to Biard. As for the uncontroverted fact that Vanden Stock himself concededly was not a victim, once again, as with so many of the troubling issues in this case, the Court of Appeals simply passed the issue by in silence.

Six circuits have held that restitution under § 3651 may not be awarded on untried counts, and certainly not to a person who is not a victim. District court orders that do so are consistently reversed. See *United States* v. *Johnson*, 700 F.2d 699, 701 (11th Cir. 1983) ("The order can require restitution only to the damaged party"); *United States* v. *Haile*, 795 F.2d 489 (5th Cir. 1986); *United States* v. *Forzese*, 756 F.2d 217 (1st Cir. 1985); *United States* v. *John Scher Presents, Inc.*, 746 F.2d 959 (3d Cir. 1984); *United States* v. *Missouri Valley Constr. Co.*, 741 F.2d 1542 (8th Cir. 1984) (*en banc*); *Fiore* v. *United States*, 696 F.2d 205 (2d Cir. 1982). These courts of appeals have consistently commented that "the [Probation] Act has been read narrowly by all the circuit courts that have addressed the question . . ." *United States* v. *Haile*, *supra*, 795 F.2d at 491. See also *United States* v. *John Scher Presents, Inc.*, *supra*, 746 F.2d at 963 ("The courts have uniformly construed this language narrowly"); *United States* v. *Missouri Valley Constr. Co.*, *supra*, 741 F.2d at 1548 (referring to "[t]he strictness with which the courts have consistently applied the monetary-payment provisions of section 3651").

Without that careful construction, restitution orders can easily be abused. Here the good sense of the decisions of these other circuits is particularly manifest—because as soon as the restitution order had been issued for the benefit of Roger Vanden Stock, the corporation his father owned, which was the only entity losing money, promptly brought a civil suit against petitioner to recover the same

funds.[21] This Court should settle which rule—that of those six circuits, or of the Ninth Circuit here—is correct.

IV. ORDERING AN ALIEN TO REMAIN IN THE UNITED STATES, AFTER A FINDING THAT TO DO SO SERVES NO PROBATIONARY PURPOSE, VIOLATES THIS COURT'S HOLDINGS UNDER THE FIFTH AND EIGHTH AMENDMENTS.

Petitioner completed a one-year prison sentence, but is not allowed to go home. On the first remand (by the other Circuit Judges, who constituted the motions panel), the District Court entered specific findings that by the transfer of custody of the stock petitioner had assured availability of sufficient property to pay the restitution in due course, and that "no further probationary purpose is to be served by retaining defendant Van Cauwenberghe in the United States." P. 38a, *infra*. Nevertheless it kept him here. Then, instead of granting relief, the Court of Appeals passed over petitioner's legal arguments in total silence, and just remanded, saying only that the requirement he remain in the United States should be reconsidered and "may be modified." P. 24a, *infra*. The District Court on remand reconsidered—but while not altering its previous findings in any respect, it granted no relief. It noted that the assets had not yet been fully liquidated and therefore the restitution not yet paid, and so it left the exile order standing.

This order of exile is not only cruel, but unusual in the most literal modern sense, and is unlawful under this Court's decisions. First, it amounts to "banishment, a fate universally decried by civilized people." *Trop* v. *Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion). Second, in *Bearden* v. *Georgia*, 461 U.S. 660 (1983), this

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[21] *Brasserie Belle-Vue, S.A.* v. *Blair, et al.*, No. CV 86-1719-JSL (C.D. Cal. 1986). The Court of Appeals described the charge as that petitioner "participated with two Americans in a scheme to defraud Roger Biard, a Belgian investment broker, *and a Belgian corporation*." P. 7a, *infra* (emphasis supplied).

Court held that as a matter of due process of law, a defendant's liberty may not be restricted simply because he is unable to pay restitution or a fine. In the record here are specific findings that petitioner can do no more than he already has. Pp. 26a, 37a-38a, *infra*. Third, many circuits have held that a condition of probation must "have a reasonable relationship to the treatment of the accused and the protection of the public." *Porth* v. *Templar*, 453 F.2d 330, 333 (10th Cir. 1971). Here the record contains a finding that the condition of probation under which petitioner after a year in prison is still being kept away from his home and children serves "no further probationary purpose." P. 38a, *infra*. It thus is, by definition, an "unnecessary" and therefore unlawful punishment. *Wilkerson* v. *Utah*, 9 Otto 130, 136 (1879). It also violates 8 U.S.C. §§ 1251(a)(4) and 1252(h), which provide that after prison an alien shall be deported, not held on probation. Yet the Ninth Circuit once again refused to address the legal issue and gave no relief. Under the law applied everywhere else, petitioner is entitled to go home, not as a matter of grace or discretion, but as a matter of legal right.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

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October 30, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5028

D.C. No. CR-84-963-AAH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

Argued and Submitted
February 5, 1987—Pasadena, California

Filed April 10, 1987
Amended September 3, 1987

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, Senior District Judge, Presiding

ORDER AND AMENDED OPINION

COUNSEL

Robert L. Brosio, Los Angeles, California, and John D. Arterberry, Stephen J. Shine, Ellyn Marcus Lindsay, Washington, D.C., for the plaintiff-appellee.

John G. Kester, Robert S. Litt, Washington, D.C., for the defendant-appellant.

Before NELSON and BEEZER, Circuit Judges, and LEAVY,* District Judge.

ORDER

The opinion filed April 10, 1987 and published at 814 F.2d 1329 is amended as indicated below.

1. On p. 1337, col. b, first paragraph (Slip op. page 16, first paragraph), delete the sentence beginning "Furthermore, ..." Insert immediately afterward the following paragraph:

> This conclusion is consistent with our holding in *United States v. Vigil*, 561 F.2d 1316 (9th Cir. 1977) (per curiam). In *Vigil*, we held that the district court should have severed trial to allow a defendant to obtain certain exculpatory evidence from a co-defendant witnesses who could not be compelled to testify in a joint trial because of the privilege against self-incrimination. *Id.* at 1317-18. Van Cauwenberghe asserts that the *Vigil* rule is invoked in his case because a foreign witness beyond the court's subpoena power refused to testify unless trial was severed. We do not read *Vigil* as conferring on foreign witnesses a blanket power to dictate whether trials should be severed, regardless of whether the witness could properly assert an evidentiary privilege.

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* Honorable Edward Leavy, United States District Judge, District of Oregon, sitting by designation.

2. On p. 1339 (Slip op. page 19 after 41(e), following line 8, insert the paragraphs:

Van Cauwenberghe argues that the transfer of property was not made voluntarily, but was made at the order and direction of the district court. He contends that under these circumstances he should not be deemed to have waived his challenges to the legality of the seizure. We have considerable difficulty accepting the predicate of this argument. First, the record below shows that Van Cauwenberghe sought and willingly complied with the order, filed on January 23, 1986 after the district court entered the guilty verdict, in order that he be permitted to leave the country and return to Belgium. Under the terms of his probation, the district court required Van Cauwenberghe to remain in this country until he satisfied his restitutionary obligation. The order itself declares that counsel for Van Cauwenberghe and the government "jointly submit the foregoing proposed order and request approval by the Court." Order, Jan. 23, 1986, at 2.

Second, while Van Cauwenberghe's appeal was pending, he lodged an emergency motion in this court in which he argued strenuously that he should be permitted to return to Belgium (which does not extradite its nationals) because he had irrevocably transferred full title to the assets to his attorney and the government's counsel for liquidation to satisfy his restitutionary obligations. The motions panel remanded to the district court for further findings to ensure that an irrevocable transfer had in fact occurred and that the assets would cover his restitutionary obligation. The district court made such findings and concluded that, since the assets were sufficient, the defendant could return home. It thus comes as something of a surprise that, after the avowals in his affidavit accompanying the emergency

motion, in his petition for rehearing the defendant is still claiming entitlement to lawful possession of the assets.

In light of these circumstances, the record does not support Van Cauwenberghe's contention that he did not transfer title to the assets voluntarily. Absent a showing that the individual requesting return of property under Rule 41(e) is entitled to its lawful possession, the property may not be released to him. Fed. R. Crim. P. 41(e); *see United States* v. *King*, 528 F.2d 68, 69 (9th Cir. 1975) (per curiam). Although Van Cauwenberghe remains the beneficial owner of the assets and any proceeds derived from their sale, he has not demonstrated entitlement to lawful possession of the assets. Return of the assets under Rule 41(e) is therefore inappropriate.

Even if we were to conclude that Van Cauwenberghe could substantiate his claim of lawful possession, we believe that we would reach the same result. Assuming that the property was illegally seized under the treaty and the fourth amendment, return of the property might nonetheless be barred by the existence of a civil writ of attachment filed against the property. *See United States v. Francis*, 646 F.2d 251, 263 (6th Cir.) (denying return of illegally seized property where state tax lien had been placed on the property), *cert. denied*, 454 U.S. 1082 (1981); *United States v. Freedman*, 444 F.2d 1387, 1388 (9th Cir. 1971) (denying return of illegally seized property because of pending IRS lien); *Guerra v. United States*, 645 F. Supp. 775, 779-80 (C.D. Cal. 1986) (same). However, because of our holding above, we express no view on whether the seizure was illegal or whether the property would have been returnable to Van Cauwenberghe despite the civil writ of attachment. We do not hold that Van Cauwenberghe lacks standing to challenge the

legality of the seizure; rather, resolution of that question is unnecessary to the disposition of his Rule 41(e) challenge on appeal.

The opinion having been thus modified, the petition for rehearing is otherwise DENIED.

The full court was advised of the suggestion for en banc rehearing and no active judge of the court requested a vote on it. Fed. R. App. P. 35(b).

The suggestion for a rehearing en banc is REJECTED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5028

USDC No. CR-84-963-AAH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

Argued and Submitted
February 5, 1987—Pasadena, California

Filed April 10, 1987

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, Senior District Judge, Presiding

OPINION

COUNSEL

Robert L. Brosio, Los Angeles, California, and John D. Arterberry, Stephen J. Shine, Ellyn Marcus Lindsay, Washington, D.C., for the plaintiff-appellee.

John G. Kester, Robert S. Litt, Washington, D.C., for the defendant-appellant.

Before NELSON and BEEZER, Circuit Judges, and LEAVY,* District Judge.

NELSON, Circuit Judge:

Wilfried Van Cauwenberghe, a citizen of Belgium, appeals from a criminal conviction on one count of wire fraud under 18 U.S.C. § 1343 (1982) and one count of interstate transportation of a victim of fraud under 18 U.S.C. § 2314 (1982). Following a jury trial, Van Cauwenberghe was convicted of participating with two Americans in a scheme to defraud a Belgian investment broker and a family-owned Belgian corporation of 3.6 million dollars relating to the purchase and development of a condominium tract near Kansas City. Van Cauwenberghe argues that numerous errors were made requiring reversal of his extradition from Switzerland, his indictment, and his trial. In addition, Van Cauwenberghe argues that the district court should have returned certain property to him because it was seized illegally, and that his sentence was improper. This court has jurisdiction under 28 U.S.C. § 1291. We affirm.

FACTS

Between 1979 and 1981, Van Cauwenberghe participated with two Americans, Alan H. Blair and Gerald L. Bilton, in a scheme to defraud Roger Biard, a Belgian investment broker, and a Belgian corporation owned by members of the Vanden Stock family, of 3.6 million dollars relating to the purchase and development of Concorde Bridge Townhouses, an apartment complex near Kansas City, Missouri. Van Cauwenberghe, Blair, and Bilton were indicted on seven counts, including three

* Although the Honorable Edward Leavy was sitting by designation at the time this case was argued and submitted, Judge Leavy became a member of this court prior to the filing of this decision.

counts of wire fraud (18 U.S.C. § 1343), three counts of interstate transportation of a victim of fraud (18 U.S.C. § 2314), and one count of conspiracy to commit fraud (18 U.S.C. § 371), in October 1984. The government learned that Van Cauwenberghe, a Belgian citizen, would be traveling from Brussels to Geneva on a brief business trip and, on November 20, 1984, filed a provisional arrest request with Swiss authorities pursuant to Article VI of the Treaty on Extradition, May 14, 1900, United States-Switzerland, 31 Stat. 1928, T.S. No. 354 ("Treaty").[1] Van Cauwenberghe was arrested by Swiss authorities as he stepped off his plane in Geneva on January 14, 1985.

On January 15, 1985, Swiss authorities also seized Van Cauwenberghe's assets at Credit Suisse and Fides Societe Fiduciare, Geneva, pursuant to the government's request under Article XII of the Treaty. These assets consisted of two stock certificates dating from 1973 in ABAMAR and BATIMAR, Panamanian land-holding corporations in which Van Cauwenberghe held 6.293% and 19.659% interests, respectively, and eighty-two unrelated documents. Van Cauwenberghe's Swiss attorney made a showing that Van Cauwenberghe had not invested any money in ABAMAR or BATIMAR since 1973, at least six years before the allegedly fraudulent acts for which he was being held. As a result, Swiss authorities agreed to release the BATIMAR certificate on February 7, 1985. The government, however, renewed its request that all stock certificates in Van Cauwenberghe's Swiss accounts be seized, and, on March 21, 1985, Swiss authorities acquiesced and again seized the BATIMAR certificate. The government subsequently filed a formal extradition request on March 12, 1985.

Van Cauwenberghe challenged his extradition before the Swiss courts including the Swiss Federal Tribunal,

[1] The government could not proceed against Van Cauwenberghe in Belgium because Belgium does not extradite its nationals.

Switzerland's highest court, which, on September 25, 1985, held that Van Cauwenberghe was extraditable under the Treaty for all of the offenses charged except conspiracy. Accordingly, Van Cauwenberghe was extradited to the United States on September 26, 1985.

The trial of Van Cauwenberghe, Blair, and Bilton began in Los Angeles on November 19, 1985. Prior to trial, the district court denied Van Cauwenberghe's motion for a severance and limited trial to counts one (interstate transportation of a victim of fraud) and two (wire fraud) (the "Biard counts"),[2] severing counts three through six (the "Vanden Stock counts") for later disposition, and dismissing count seven (conspiracy). The district court also denied Van Cauwenberghe's motions to dismiss the indictment due to improper extradition, to dismiss count two for failure to state an interstate offense, and for transfer of venue to Washington, D.C. In addition, the district court denied Van Cauwenberghe's motion under Fed. R. Crim. P. 41(e) to release his stock certificates in ABAMAR and BATIMAR, and ordered all property seized by Swiss authorities deposited into the registry of the court pending the outcome of the trial.

The theory of Van Cauwenberghe's defense at trial was that he was merely an innocent pawn in the fraudulent scheme, not a culpable participant. During trial, Roger Vanden Stock, a director of the family-owned Belgian corporation, was allowed to testify about com-

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[2] The indictment alleged a scheme to defraud both Roger Biard and the Vanden Stock family and broke down into seven counts:

Count I	—	18 U.S.C. § 2314 (Biard)
Count II	—	18 U.S.C. § 1343 (Biard)
Count III	—	18 U.S.C. § 2314 (Vanden Stock)
Count IV	—	18 U.S.C. § 2314 (Vanden Stock)
Count V	—	18 U.S.C. § 1343 (Vanden Stock)
Count VI	—	18 U.S.C. § 1343 (Vanden Stock)
Count VII	—	18 U.S.C. § 371 (Biard & Vanden Stock)

munications between the Vanden Stock family and defendants, over Van Cauwenberghe's objections that such testimony was unduly prejudicial and improper because trial was limited to the two Biard counts. The court also allowed extensive testimony, over Van Cauwenberghe's objections, regarding Blair's misrepresentations to both Biard and the Vanden Stocks made outside the presence of Van Cauwenberghe.

The jury found all three defendants guilty on both counts. Van Cauwenberghe's motions for judgment of acquittal and for a new trial were denied, and judgment for the government was entered on January 22, 1986. On motions by the government, the district court dismissed the Vanden Stock counts against all defendants and agreed to retain the stock certificates until sentencing. The district court sentenced Van Cauwenberghe to a $10,000 fine and one year and one day in custody on the first count, crediting him for 373 days already served in pretrial confinement, and to a $1,000 fine and a five-year probation on the second count. As conditions of probation on count two, the district court ordered Van Cauwenberghe (1) to make restitution of $458,373.89 to Roger Vanden Stock and $34,501.26 to Roger Biard; (2) not to engage in any real estate transactions, except to liquidate his property, or wire transfers, except to his family; and (3) not to leave the United States until the restitution is paid.[3]

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[3] Upon Van Cauwenberghe's emergency motion to modify the conditions of his probation so as to allow him to travel to his home in Belgium, a panel of this court ordered a limited remand to the district court on December 31, 1986. On February 17, 1987, the district court entered an order in which it found that (1) Van Cauwenberghe has relinquished sufficient property to pay the restitution in due course; (2) Van Cauwenberghe has irrevocably transferred full title to the property so that he cannot regain control over it if allowed to return to Belgium; and (3) there is no further probationary purpose to be served by requiring Van Cauwenberghe to remain in the United States.

Because the 373 days of pretrial confinement for which Van Cauwenberghe received credit exceeded his custodial sentence on count one, Van Cauwenberghe immediately began his probation. The stock certificates were released into the joint custody of the government and Van Cauwenberghe for liquidation. The amount realized upon liquidation was ordered to be deposited back into the registry of the district court. The excess, up to $600,000 above the $492,875.15 restitution, realizable upon the eventual sale of the certificates, was attached on February 6, 1986, pursuant to a civil action filed by Biard against Van Cauwenberghe in the district court.

Van Cauwenberghe timely appealed on January 31, 1986. Neither Blair nor Bilton, co-defendants below, is a party to this appeal.

DISCUSSION

I. EXTRADITION

The district court's decision that an offense is an extraditable crime presents a legal question subject to de novo review by this court. *Quinn v. Robinson*, 783 F.2d 776, 791-92 (9th Cir.), *cert. denied*, 107 S. Ct. 271 (1986).

The right "to demand and obtain extradition of an accused criminal is created by treaty." *Id.* at 782; *see Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933). The offense complained of must ordinarily, therefore, be listed as an extraditable crime in the treaty. *Quinn*, 783 F.2d at 791. In addition, "under the doctrine of 'dual criminality,' an accused person can be extradited only if the conduct complained of is considered criminal by the jurisprudence or under the laws of both the requesting and requested nations." *Id.* at 783; *In re Extradition of Russell*, 789 F.2d 801, 803 (9th Cir. 1986). This dual criminality requirement has been expressly incorporated into the Treaty. *See* Treaty, art. II, 31 Stat. at 1929,

T.S. No. 354, at 2. To satisfy this "dual criminality" requirement,

> "[t]he law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions."

Russell, 789 F.2d at 803 (quoting *Collins v. Loisel*, 259 U.S. 309, 312 (1922)).

As a matter of international comity, "[t]he doctrine of 'specialty' prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite." *Quinn*, 783 F.2d at 783. However, since the doctrine is based on comity, its "protection exists only to the extent that the surrendering country wishes." *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (per curiam), *cert. denied*, 107 S. Ct. 652 (1986). Therefore, the " 'extradited party may be tried for a crime other than that for which he was surrendered *if the asylum country consents.*' " *Id.* (quoting *Berenguer v. Vance*, 473 F.Supp. 1195, 1197 (D.D.C. 1979)); *see* M. Bassiouni, *International Extradition* ch. VII, at 6-11 (1983).

Van Cauwenberghe argues that his extradition was improper because the Treaty does not identify wire fraud and interstate transportation of a victim of fraud as extraditable offenses. The Treaty does not expressly name these specific offenses but includes "obtaining money or other property by false pretenses [and] receiving money . . . knowing the same to have been . . . fraudulently obtained." Treaty, art. II(6), 31 Stat. at 1930, T.S. No. 354, at 3. Moreover, the government insists that Van Cauwenberghe's argument is foreclosed by the Swiss Federal Tribunal's decision because "determination of whether a crime is within the provisions of

an extradition treaty is within the sole purview of the requested state," citing *Johnson v. Browne*, 205 U.S. 309, 316 (1907), and *McGann v. U.S. Bd. of Parole*, 488 F.2d 39, 40 (3d Cir. 1973) (per curiam), *cert. denied*, 416 U.S. 958 (1974). We agree.

Johnson involved an extradition request by the United States to Canada. The Canadian government determined that one of the offenses for which extradition was sought, conspiring to defraud the government, was not a form of fraud provided for in the subdivision of the article of the treaty listing extraditable fraud offenses. *Johnson*, 205 U.S. at 312. The Supreme Court held that "[w]hether the crime came within the provision of the treaty was a matter for the decision of the Dominion authorities, and such decision was final by the express terms of the treaty itself." *Id.* at 316 (citing to Article II of the treaty). Article II of the treaty in *Johnson* dealt only with offenses of a political character and expressly stated that "[i]f any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final." *Id.* at 319 n.1.

Because of this language in the *Johnson* treaty, Van Cauwenberghe argues that the holding in *Johnson* should be read narrowly. We believe, however, that the *Johnson* holding need not be read narrowly and that the first half of the sentence makes a broader statement regarding the proper deference to be accorded a surrendering country's decision on extraditability. The Canadian government's decision was not that the offense was non-extraditable because it was of a political character, a position that might have justified a narrower reading of *Johnson*. Instead, it maintained that the offense did not fall within the treaty's category of extraditable fraud offenses. *Id.* at 312. Thus, we believe that the first half of the sentence addressed the proper deference to be

accorded a surrendering country's decision as to whether a particular offense comes within a treaty's extradition provision.

In *McGann*, the Third Circuit also construed *Johnson* broadly. *McGann* involved the properiety of an extradition from Jamaica in which the Jamaican court held a parole violater extraditable under its treaty with the United States. The *McGann* court found the *Johnson* language controlling: "The holding of Johnson v. Browne . . . precludes any review of the Jamaican court's decision as to the extraditable nature of the offense . . . ." *McGann*, 488 F.2d at 40. We agree with the Third Circuit's reading of *Johnson*. According deference to the surrendering country's decision as to extraditability already underlies the related "doctrine of specialty." It would render that doctrine practically meaningless to hold that courts cannot try an extradited party for offenses other than those for which the surrendering government agreed to extradite, but need not defer to the surrendering government's threshold decision as to whether an offense is extraditable.

We therefore defer to the Swiss Federal Tribunal's decision as to Van Cauwenberghe's extraditability under the Treaty and hold that Van Cauwenberghe was properly extradited.

II. THE INDICTMENT

Van Cauwenberghe argues that count two of his indictment should have been dismissed because it was self-contradictory and failed to state an offense. Count two of Van Cauwenberghe's original indictment incorporates the allegations in count one relating to the fraudulent scheme and states:

> 2. On or about December 6, 1979, within the Central District of California, the defendants ALAN H. BLAIR, GERALD L. BILTON and WIELFRIED

> [sic] VAN CAUWENBERGHE, for the purpose of executing the aforesaid scheme and artifice, did cause to be transmitted in interstate commerce, signs, signals, and sounds by means of wire communications, that is, a telex between Geneva, Switzerland, and Los Angeles, California, directing the transfer of $1 million fraudulently obtained from Roger Biard to an account in the name of Hexagonal Valley, N.V., at Manufacturer's Bank, Los Angeles, California.

Van Cauwenberghe argues that this count is self-contradictory because such a telex would be *only* in foreign commerce, citing *Wentz v. United States*, 244 F.2d 172, 175 (9th Cir.), *cert. denied*, 355 U.S. 806 (1957). We disagree.

In *Wentz*, an indictment charging a telex transmission "by means of interstate and foreign wire" expressly stated its origin in Los Angeles and the path of its transmission through Dallas and San Antonio, Texas, to Mexico City, Mexico. *Id.* at 173. The wire fraud statute in force when the indictment was issued (an early version of 18 U.S.C. § 1343) proscribed only transmissions by interstate wire. *Id.* at 174. Because the telex originated in Los Angeles and terminated in Mexico City, defendants insisted that this was solely foreign commerce, relying on *Border Pipe Line Co. v. Federal Power Commission*, 171 F.2d 149 (D.C. Cir. 1948). We held, however, that the telex was transmitted in interstate commerce under the wire fraud statute because its path included the interstate transmission from Los Angeles to Dallas. *Wentz*, 244 F.2d at 176. With respect to *Border Pipe*, we stated that "we do not read that case as reaching the question that would have arisen if the gas had flowed from Texas to New Mexico and thence across to Mexico." *Id.*

In our case, evidence at trial demonstrated that the telex between Geneva and Los Angeles which formed the

basis of count two actually followed a path consisting of three transmissions: (1) a foreign transmission from Geneva to New York City; (2) an intra-city transmission across New York City; and (3) an interstate transmission from New York City to Los Angeles. Thus, like the path of the telex in *Wentz*, the path of this telex also included an interstate transmission. This was not, therefore, "a foreign transmission without an interstate aspect," *id.* at 175, as alleged by Van Cauwenberghe. The only relevant difference between *Wentz* and our case is that in *Wentz* the path of the telex was expressly described in the indictment and labeled a transmission in interstate *and* foreign commerce, whereas here only the origin and end of the telex were described and only interstate commerce was indicated.

Van Cauwenberghe argues that the differences in description and labeling are determinative. However,

> an indictment is not to be read in a technical manner, but is to be construed according to common sense with an appreciation of existing realities. It must be read to include facts which are necessarily implied by the allegations made therein. Even if an essential averment in an indictment is faulty in form, if it may by fair construction be found within the text, it is sufficient.

United States v. Anderson, 532 F.2d 1218, 1222 (9th Cir.) (citations omitted), *cert. denied*, 429 U.S. 839 (1976). The existing reality is that the telex that formed the basis for count two while originating in Geneva and terminating in Los Angeles, actually included a transmission in interstate commerce precisely as charged in the indictment. Therefore, Van Cauwenberghe's argument that the telex described in count two could only be in foreign commerce is incorrect.

Since Van Cauwenberghe was tried and convicted for a telex that was transmitted in interstate commerce as

charged, this is not a case in which Van Cauwenberghe was convicted "based on an offense that is different from that alleged in the grand jury's indictment." *United States v. Miller*, 471 U.S. 130, 142 (1985). This is also not a case, as alleged by Van Cauwenberghe, in which the indictment was altered by the district court. The district court correctly instructed the jury that count two stated a transmission that touched both foreign and interstate commerce and that it could base a finding of guilty under either theory. Therefore, count two of the indictment properly stated an offense for which Van Cauwenberghe was tried and convicted.

III. ALLEGED ERRORS AT TRIAL

We review the district court's decisions with respect to severance and admissibility of evidence under an abuse of discretion standard. *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1412 (9th Cir. 1986); *United States v. Ramirez*, 710 F.2d 535, 545 (9th Cir. 1983). We will not reverse for an abuse of discretion unless we have "a definite and firm conviction that the court below committed an error." *Maddox*, 792 F.2d at 1412.

A. SEVERANCE

Ordinarily, "defendants jointly charged are to be jointly tried." *Ramirez*, 710 F.2d at 545; *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir.), *cert. denied*, 449 U.S. 856 (1980). "Whether severance is necessary is within the sound discretion of the district court." *Ramirez*, 710 F.2d at 545; *United States v. Gee*, 695 F.2d 1165, 1169 (9th Cir. 1983). A trial judge may order a severance if it appears that a defendant may be significantly prejudiced by a joint trial with his codefendants. *See Escalante*, 637 F.2d at 1201.

In order to prove that the district court abused its discretion in denying a motion for severance, the moving

party must show that joint trial was "'so prejudicial that the trial judge could exercise his discretion in only one way.'" *United States v. Arbelaez*, 719 F.2d 1453, 1460 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984) (quoting *Escalante*, 637 F.2d at 1201). "'The party seeking reversal of a decision denying severance . . . has the burden of proving "clear," "manifest," or "undue" prejudice from the joint trial. The defendant must prove that the prejudice was of such magnitude that he was denied a fair trial.'" *Id.* (quoting *Escalante*, 637 F.2d at 1201 (citations omitted).

Van Cauwenberghe argues that the district court's denial of his motion for severance denied him a fair trial because (1) he was unable to obtain exculpatory testimony from Monique Mat, wife of co-defendant Blair and (2) joint trial with Blair allowed the Government to introduce into evidence statements by Blair that would have been inadmissible against Van Cauwenberghe in a separate trial. We disagree.

First, Van Cauwenberghe insists that Monique Mat would have offered exculpatory testimony on his behalf in a separate trial, but that exercise of her marital privilege not to testify in the joint trial prevented the introduction of such testimony. However, the testimony Van Cauwenberghe claims Mat would have given—that a $271,000 wire transfer that Van Cauwenberghe received from Blair was in repayment of an earlier loan to her—is not subject to the marital privilege, which "is not available unless the anticipated testimony 'would in fact be adverse' to the nonwitness spouse." *In re Martenson*, 779 F.2d 461, 463 (8th Cir. 1985) (quoting *United States v. Smith*, 742 F.2d 398, 401 (8th Cir. 1984)). We do not believe that testimony that Blair's wire transfer to Van Cauwenberghe was in repayment of Mat's loan would have been adverse in any way to Blair's interests in the proceedings. Moreover, "blanket assertions of the privilege are not favored. '[T]he privilege

is not a general one. It must be asserted as to particular questions.'" *Id.* (quoting *Smith*, 742 F.2d at 401) (citation omitted). Joint trial, therefore, did not prevent Mat from testifying on Van Cauwenberghe's behalf and exercising her marital privilege not to testify in response to any particular questions that might have elicited a response adverse to Blair's interests. Furthermore, the "exculpatory" evidence that Mat's testimony would have brought out came fully before the jury in the form of Mat's affidavit stating that the $271,000 wire transfer was in repayment of an earlier loan to her.[*]

[†]

Second, testimony regarding Blair's misrepresentations to Biard and members of the Vanden Stock family outside of Van Cauwenberghe's presence would arguably have been admissible even in a separate trial as probative of the fraudulent scheme underlying the charges. If not, the test is "'whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants in light of its volume and limited admissibility.'" *Ramirez*, 710 F.2d at 546 (quoting *United States v. Brady*, 579 F.2d 1121, 1128 (9th Cir. 1978), *cert. denied*, 439 U.S. 1074 (1979)). "A variety of factors can be relevant to this determination depending upon the facts of the particular case." *Id.*

In this case, there is no claim that Van Cauwenberghe's and Blair's defenses were mutually exclusive. "Only where the acceptance of one party's defense will preclude the acquittal of the other party does the existence of antagonistic defenses mandate severance." *Id.* Van Cauwenberghe only claims that he suffered from aspersions of guilt by association with the more culpable

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[* The preceding sentence was ordered deleted by the Court in its order of September 3, 1987.]

[† At this point an additional paragraph was ordered inserted by the Court in its order of September 3, 1987.]

Blair. However, the mere fact that a criminal defendant is jointly tried with a more culpable codefendant is not alone sufficient to constitute an abuse of the district court's discretion. *See Ramirez*, 710 F.2d at 547 (holding that joint trial with co-defendant against whom there was overwhelming evidence not prejudicial when there was little chance of it "spill[ing] over"). We do not believe that evidence of Blair's guilt spilled over to Van Cauwenberghe. When, as here, the district court instructed the jury to consider the guilt or innocence of each co-defendant separately, in light of the evidence against that defendant, the jury is presumed to have obeyed. *United States v. Rasheed*, 663 F.2d 843, 854-55 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982); *Escalante*, 637 F.2d at 1202. Therefore, the district court did not abuse its discretion by denying Van Cauwenberghe's motion for a separate trial.

B. VANDEN STOCK TESTIMONY

Van Cauwenberghe also argues that the district court abused its discretion in admitting the testimony of Roger Vanden Stock regarding communications between defendants and members of the Vanden Stock family and the ultimate transaction between Blair and the Vanden Stocks. This argument is meritless. The specific counts on which Van Cauwenberghe was tried clearly charged that the acts therein were in furtherance of a single scheme to defraud both Biard and the Vanden Stocks. The communications and transactions with the Vanden Stocks constituted "an integral part" of that scheme. *See United States v. Poston*, 727 F.2d 734, 740 (8th Cir.) ("[C]riminal activity is an integral part of the offense charged if it is 'so blended or connected with the one on trial as that proof of one incidentally involves the other or explains the circumstances thereof . . . .' ") (quoting *United States v. Miller*, 508 F.2d 444, 448-49 (7th Cir. 1974)), *cert. denied*, 466 U.S. 962 (1984). Roger Vanden Stock's

testimony was clearly admissible, therefore, because it was highly probative of the fraudulent scheme alleged in the counts on which Van Cauwenberghe was tried.

IV. SEIZURE AND RETENTION OF ASSETS

Van Cauwenberghe argues that the district court erred in denying his motion under Fed. R. Crim. P. 41(e) for the return of the property that was seized from his Swiss accounts. He argues that the property was illegally seized under Article XII of the Treaty and under the fourth amendment of the United States Constitution. In addition, Van Cauwenberghe argues that the district court had no statutory or other legitimate basis on which to retain his property in order to ensure payment of restitution.

To prevail on a Rule 41(e) motion, a criminal defendant must demonstrate that (1) he is entitled to lawful possession of the seized property; (2) the property is not contraband; and (3) either the seizure was illegal or the government's need for the property as evidence has ended. *See Sovereign News Co. v. United States*, 690 F.2d 569, 577 (6th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); *United States v. Hubbard*, 650 F.2d 293, 303 (D.C. Cir. 1980); Fed. R. Crim. P. advisory committee note; 3 C. Wright, *Federal Practice and Procedure* § 673, at 761-65 (2d ed. 1982).

There is no dispute that Van Cauwenberghe was the rightful owner of the property at the time it was seized from his Swiss bank accounts.[4] However, he no longer owns the property. On limited remand from this court.[5] the district court found, and Van Cauwenberghe admits, that he irrevocably transferred full title to the property

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[4] The record does not indicate that the Swiss bank had any proprietary interest in the property, only that it served as a repository for safekeeping.

[5] *see supra* note 3.

to his own attorney and counsel for the United States, acting jointly, to satisfy his restitution condition. Thus, although the district court may have been under a duty to return property that neither was contraband nor had any evidentiary value,[6] *see Hubbard*, 650 F.2d at 303 & n.26, Van Cauwenberghe can no longer demonstrate that he is entitled to lawful possession of the property and, therefore, no longer satisfies the first requirement under Rule 41(e).

[*]

V. THE SENTENCE

The legality of a criminal sentence is subject to de novo review by this court. *United States v. Schiek*, 806 F.2d 943, 944 (9th Cir. 1986). Sentencing that falls within statutory limits, however, is left to the sound discretion of the district court and is reviewed under an abuse of discretion standard. *See United States v. Messer*, 785 F.2d 832, 834 (9th Cir. 1986). Van Cauwenberghe argues that his sentence was improper because (1) he should not have been required to make restitution to Roger Vanden Stock; (2) the amount of restitution ordered was arbitrary and capricious; and (3) requiring him to remain in the United States was improper. We disagree.

The Federal Probation Act, 18 U.S.C. § 3651 (1982), authorizes district courts to require restitution to "aggrieved parties for actual damages or loss caused by the offense for which conviction was had" as a condition of probation. We have interpreted § 3651 to mean that "absent a fully bargained plea agreement, the sentencing

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[6] The stock certificates were not used as evidence, and nothing in the record indicates they had any connection with the crimes committed or alleged. Indeed, the record shows that the certificates had remained dormant since 1973, well before the fraudulent scheme commenced.

[* At this point four additional paragraphs were ordered inserted by the Court in its order of September 3, 1987.]

court may not impose restitution of amounts beyond those alleged in the indictment counts on which conviction is had." *United States v. Whitney*, 785 F.2d 824, 825 (9th Cir. 1986); *United States v. Black*, 767 F.2d 1334, 1344 (9th Cir.), *cert. denied*, 106 S. Ct. 574 (1985). In this case, Van Cauwenberghe was tried and convicted only on the Biard counts, and there was no plea agreement. Therefore, Van Cauwenberghe argues, he should not have been required to make restitution beyond the Biard counts to Roger Vanden Stock.

We have interpreted § 3651, however, to allow restitution to aggrieved parties not named in counts for which probation is ordered. *See United States v. Orr*, 691 F.2d 431, 434 (9th Cir. 1982) (stating that nothing in the language of § 3651 requires an interpretation "that restitution may not be ordered to a party not named in the count for which probation was ordered"). Moreover, the entire scheme to defraud Biard and the Vanden Stock family of 3.6 million dollars was alleged in the indictment counts for which Van Cauwenberghe was convicted. By specifying the total amount alleged to have been fraudulently obtained in the indictment, "the indictment gave [defendant] fair notice of the damages the government intended to prove he caused his victims to suffer and placed a ceiling above which a restitution order would have been improper." *Schiek*, 806 F.2d at 944. The indictment thus put Van Cauwenberghe on notice that the government intended to prove his participation in a scheme to defraud both Biard and the Vanden Stocks of 3.6 million dollars. It was not improper, therefore, to impose restitution for both Biard and Vanden Stock.

The $492,875.15 restitiution figure imposed on Van Cauwenberghe was set at 17.6% of the actual losses resulting from the fraudulent scheme.[7] This amount is

[7] The district court found that Van Cauwenberghe had received 17.6% of the proceeds from the fraudulent venture and based its restitution order on this finding.

much less than either the losses alleged in the indictment or the total actual losses proved at trial. Since joint and several liability for the entire actual loss could have been imposed on each defendant, *see United States v. Tzakis*, 736 F.2d 867, 870-71 (2d Cir. 1984), the district court did not abuse its discretion by imposing this lower figure.

Finally, Van Cauwenberghe contends that the district court's condition that he remain in the United States until restitution is paid is improper. In response to our limited remand on Van Cauwenberghe's emergency motion, the district court found that Van Cauwenberghe's continuing presence in this country no longer serves any probationary purpose.[8] Thus, Van Cauwenberghe's probation may be modified to allow him to return to Belgium. Accordingly, we remand to the district court with instructions to consider modifying this condition of Van Cauwenberghe's probation.

Affirmed and remanded for modification of terms of probation.

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[8] *See supra* note 3.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5028

DC# CR 84-963-3-AAH
Central California

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed March 4, 1986]

ORDER

Before: TANG and POOLE, Circuit Judges

Appellant is directed to file a supplemental financial affidavit that sets forth a complete accounting of his current assets and financial status.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5028

DC# CR 84-963-3-AAH
Central California

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed March 26, 1986]

ORDER

Before: TANG and POOLE, Circuit Judges

Appellant's motion for leave to proceed in forma pauperis is granted.

The motion of John G. Kester, Esq., to be appointed as counsel of record on appeal is granted. Kester will be appointed by separate order.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5028

DC# CR 84-963-3-AAH
Central California

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILFRIED VAN CAUWENBERGHE,
Defendant-Appellant.

[Filed Dec. 31, 1986]

ORDER

Before: CANBY and REINHARDT, Circuit Judges

Appellant requests the court to modify the condition of probation requiring him to remain in the United States until restitution in the amount of $492,875.15 is paid. Appellant requests that he be allowed to travel to Belgium. Appellee opposes the motion.

The parties disagree over the factual question of the degree to which appellant has relinquished control of his assets to his counsel and appellee's counsel. This case is remanded to the district court for further findings as to

whether appellant has relinquished control of sufficient assets to pay the full restitution in due course, and whether appellant has released control to the extent that he cannot regain control over those assets if he is allowed to return to Belgium. In addition, the district court shall make findings as to whether there is any other probationary purpose to be served by retaining appellant in the United States under the circumstances of this case.

The district court shall resolve this matter at its earliest convenience and forward a copy of the order to this court.

APPENDIX F

Transcript of Proceedings, *United States* v. *Blair, et al.*, No. CR 84-963-AAH, U.S. District Court, Central District of California, Dec. 17, 1985 and Jan. 22, 1986.

[17] MR. KESTER [Petitioner's counsel]: . . . [A]s your Honor will recall, there is a substantial sum of his assets that are being held in [18] custodia legis . . .

THE COURT: What are you talking about? In custodia legis?

MR. KESTER: A substantial amount of Mr. Van Cauwenberghe's assets were brought over from Switzerland. We had a hearing before your Honor on that before the trial began.

THE COURT: I can't remember. What were they? Bonds and stocks?

MR. KESTER: They were stocks in two Spanish or Panamanian companies owning land in Spain that had nothing to do with the facts of the case, but they were nevertheless brought over.

* * * *

[19] THE COURT: Well, the case is over. I will release them from the custodia legis. I will release those things. I don't see any point to holding them. They are not going to be used in evidence.

MR. KESTER: Thank you, your Honor.

MR. ARTERBERRY [Prosecutor]: Your Honor, those assets, the Court may recall, have become the subject of a civil action that is pending here.

THE COUT: I didn't know that.

MR. TWITTY [Counsel for other defendant]: Mr. Arterberry is finally showing his true colors. He has become a civil lawyer now.

THE COURT: Wait a minute. Wait a minute now. If the government is trying to forfeit them by means of a civil case.

MR. TWITTY: The government is not, Judge. The government is not party to this.

MR. ARTERBERRY: The government will be happy to speak for itself.

THE COURT: I say if the government is trying to forfeit them in a civil action, which is the appropriate way to do it in this kind of a case—this is not a RICO case where the government has to use the criminal process to forfeit anything that was used in the alleged crime—but if you are trying to get them released for some private [20] party—

MR. KESTER: That is exactly what he is trying to do.

THE COURT: Such as Biard or one of those other fellows.

MR. ARTERBERRY: Your Honor, I would be happy to speak for the government.

THE COURT: Yes, let him speak. What is it that you want to tell me?

MR. ARTERBERRY: The government will seek restitution from these defendants. Those funds or whatever value the stock may have—and that is not clear at all—but whatever value it may have it may go towards the satisfaction of any restitution the Court may find appropriate.

THE COURT: That is another problem.

MR. ARTERBERRY: It is, your Honor, but it does reflect the interest the parties have in these funds.

MR. KESTER: Your Honor, these funds were brought over here simply on the representations of the government that they might constitute evidence in some respect. It has been shown before the case, before the trial, eminently during the trial, that these funds, these assets, had nothing to do with anything that happened in this case, and the government has no business trying to—

[21] THE COURT: I know, but on the other hand, if it is in custodia legis, and we have a question of res-

titution, which we do and which I have to order under the law since the verdicts are guilty, it seems to me they should stay in custodia legis. So ordered.

MR. KESTER: Your Honor, if you will recall, we discussed this matter in our pretrial motion and pointed out to the Court that there is no authority in the statute or anywhere in the case law for holding property pending restitution. There is specific statutory authority for holding property pending forfeiture if certain showings are made. There is statutory authority for a fine after—

THE COURT: I am going to make case law then. You take it up to the Ninth Circuit if you don't like it. So ordered.

* * * *

[215] THE COURT: Well, as I make it payable into the registry of the Court, you still have to get an order of the Court [to] get what's in there already out.

MR. KESTER: Right, and I take it your Honor would issue an order to the clerk to hand over the assets to me for purposes of getting them liquidated as quickly as possible.

THE COURT: Well, if I hear no objection from the government.

MR. ARTERBERRY: Your Honor, the only reservation the government would have is that these assets are turned over to counsel and he does that under some custodial—

THE COURT: I'll make them turned over to you [216] both of you as co-counsel, you as government's counsel and—

MR. ARTERBERRY: Very well, your Honor.

THE COURT: —Mr. Kester, both of you and then you try to liquidate it.

MR. ARTERBERRY: Very well, your Honor.

MR. KESTER: I would undertake, your Honor, to do it myself. I don't think Mr. Arterberry has to be involved in the transaction.

THE COURT: Well, he gets worried so let him get involved, at least he'll be peeking over your shoulder.

MR. KESTER: I'm afraid that might impede the liquidation.

THE COURT: I doubt it. I rather see him liquidate it than sit around as packages in court—in the registry of the Court.

MR. ARTERBERRY: That makes sense, your Honor.

THE COURT: All right. Any legal reason why sentence should not now be pronounced.

* * * *

[223] MR. KESTER: . . . With respect to the assets that Mr. Arterberry and I are going to try to liquidate, may we pick those up from the clerk tomorrow?

THE CLERK: You'll need a signed order.

MR. KESTER: We'll submit an order.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 84-963-AAH

UNITED STATES

v.

ALAN H. BLAIR, *et al.*,
Defendants.

[Filed Jan. 23, 1986]

ORDER

In accordance with the sentence of this Court that defendant Van Cauwenberghe pay a fine and restitution, and to assist prompt payment thereof, it is by the Court hereby ordered as follows:

1. Counsel for defendant Van Cauwenberghe, subject to the oversight of counsel for the United States, shall promptly seek to sell or otherwise liquidate all assets currently held in the registry of the Court that were transmitted to the Court pursuant to the extradition of defendant Van Cauwenberghe from Switzerland. Negotiations for the sale or liquidation of such assets shall be subject to the advance approval and full monitoring of counsel for the United States.

2. Closing of a sale or other liquidation of said assets up to the amounts ordered to be paid by the Court shall be monitored by counsel for the United States and is subject to approval by counsel for the United States. If such approval is not given promptly when requested, the

proposed sale or liquidation may be submitted to the Court for approval.

3. In order that the sentence of this Court and the terms of this order may be carried out promptly, the Clerk of this Court is hereby directed to deliver forthwith all assets and accompanying materials hereinabove referred to and currently in the registry of this Court to the joint custody of John D. Arterberry, counsel for the United States, and John G. Kester, counsel for defendant Van Cauwenberghe.

4. Upon sale or other liquidation of the aforesaid assets, counsel for defendant Van Cauwenberghe shall transmit to the Clerk of this Court for deposit in the registry of this Court the amount realized from such sale or liquidation, in cash or cash equivalents. All sums so transmitted up to the amount of restitution ordered shall be retained in the registry by the Clerk until final disposition of appellate review of this case.

SO ORDERED this 23d day of January, 1986.

/s/ A. Andrew Hauk
Senior United States District Judge

The undersigned jointly submit the foregoing proposed order and request approval by the court.

/s/ John D. Arterberry
JOHN D. ARTERBERRY
Counsel for the United States

1-23-86

/s/ John G. Kester
JOHN G. KESTER
Counsel for Defendant Van Cauwenberghe

1-23-86

APPENDIX H

JUDGMENT AND PROBATION COMMITMENT ORDER

January 22, 1986

There being * * * a verdict of GUILTY, on counts 1 & 2 Defendant has been convicted as charged of the offense(s) of interstate transportation of a victim of fraud; aiding and abetting; causing an act to be done in violation of Title 18 USC 2314 and 18 USC 2 as charged in count 1 and wire fraud; aiding and abetting; causing an act to be done in violation of 18 USC 1343 as charged in count 2. The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day and the defendant shall become eligible for parole pursuant to Title 18 U.S.C. 4205(a) upon serving one-third of the sentence of imprisonment herein imposed and the defendant shall pay a fine to the United States in the sum of $10,000.00 on count 1 of the indictment.

IT IS ORDERED that on count 2 the defendant shall pay a fine to the United States in the sum of $1,000.00 and the imposition of the sentence of imprisonment only is hereby suspended and the defendant is placed on probation for a period of five (5) years to commence upon his release from confinement and on the following terms and conditions: 1—that he obey all local, state and federal laws; 2—that he comply with the rules and regulations of the probation office and General Order No. 225; 3—that he make restitution in the total sum of $492,875.15 of which $34,501.26 shall be paid to Roger Biard and $458,373.89 shall be paid to Roger Vanden-

stock; 4—that the fines and restitution herein imposed shall be paid in such amounts and on such terms and conditions as the probation office may impose having due regard for the defendant's income, employment status and family expenses; 5—that the defendant shall not participate in any way in any ventures or deals in land and real estate, excluding the liquidation of any property to pay the restitution and fines herein imposed, and that he not participate in any wire transfers of money or any other assets except to his family and that the probation office shall approve any such transfers and the defendant not engage in any money laundering; 6—that the defendant shall not leave the United States until restitution is paid; said sentence on count 2 shall run consecutive to count 1 as to the fine and concurrent as to imprisonment and suspended sentence.

IT IS ORDERED that the defendant be given credit for time served of three-hundred seventy three (373) days. . . . .

IT IS ORDERED that the defendant, whose address is: 30 Avenue Edouard Lacomble, Etterbeek 1040 Brussels, Belgium, pay a total fine to the United States of America in the sum of $11,000.00 . . .

* * * *

/s/ A. Andrew Hauk
A. ANDREW HAUK
Date 1-22-86

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 84-963-AAH

UNITED STATES

vs.

ALAN H. BLAIR, *et al.*,
Defendants.

[Filed Feb. 17, 1987]

FINDINGS OF FACT

In response to the Order of the United States Court of Appeals for the Ninth Circuit filed December 31, 1986, this Court upon consideration of the evidence submitted hereby finds by preponderance of the evidence the following:

1. Defendant Van Cauwenberghe has relinquished control of sufficient assets, consisting of capital shares of Abamar Corporation and Batimar Corporation, to pay the full restitution ordered in this case in due course. The total value of the assets of which he has relinquished control appears to be in excess of $1 million. The amount of restitution ordered is $492,875.15. Those assets are in the process of being sold and will be liquidated when the sales are completed.

2. Defendant Van Cauwenberghe has relinquished control of those assets and he cannot regain control over

them if he is allowed to return to Belgium. Defendant Van Cauwenberghe has irrevocably transferred full title to them to counsel for the United States and his own counsel, acting jointly. No action may be taken with respect to those shares except by the joint direction of both his own counsel and counsel for the United States. Defendant Van Cauwenberghe no longer has any ability to affect those assets in any way. His return to Belgium will not in any way allow him to regain control of those assets.

3. In the present circumstances, no further probationary purpose is to be served by retaining defendant Van Cauwenberghe in the United States.

In accordance with the Order of the Court of Appeals, it is by the Court this 13th day of February, 1987, hereby

ORDERED that the foregoing findings of fact be transmitted by the Clerk to the United States Court of Appeals for the Ninth Circuit forthwith.

/s/ A. Andrew Hauk
Senior United States District Judge

Dated: February 13, 1987, aff'd in oral hearing during which the Court read into the record the aforesaid 3 findings. Dated Feb. 17, 1987

/s/ Hauk

APPENDIX J

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

February 24, 1933

The Honorable

The Secretary of State

My dear Mr. Secretary:

The existing situation respecting the scope and operation of treaties between the United States and foreign nations relating to extradition is very unsatisfactory from the standpoint of the Department of Justice in that they do not seem to provide for extradition from foreign countries at the request of the United States of persons charged under Federal law with using our mails to defraud. Revelations made during the last year or two of the operation of individuals and corporations within the United States in selling to the public vast amounts of securities upon false representations as to their value, and in connection with which the United States mails have been used, have shocked the moral sense of the nation. In my judgment, malefactors of this type, in the wreckage and losses they have inflicted, have done more harm to the average citizen then the perpetrators of a great variety of crimes which are extraditable offenses. I am informed that the difficulty with our extradition treaties in this respect is that they do not cover cases where the mails are used as an instrument of fraud, and that the probable reason for this is that foreign nations, not having the dual system of sovereignties, state and national, which we have, do not enact statutes of their own punishing the use of the post for fraud but prosecute under other kinds of criminal statutes.

We have had a number of instances in which persons engaged on a large scale in violating the mail fraud statutes of the United States have gone to foreign countries to escape prosecution. Just recently there was brought to my attention the case of one Frank P. Parish of Chicago, who was indicted in the United States District Court in Illinois for the use of the mails to defraud in connection with the stock of the Missouri-Kansas Pipe Line Company. This is an important case in which large frauds have been perpetrated on innocent victims and the offense is as heinous as any sort of crime against property and human rights. I have just learned that the defendant has absconded and left for some foreign country to escape trial and punishment. The amount of his bond is insignificant compared with the nature of his offense. I am writing in the hope that the officials of your Department having to do with the subject of extradition treaties will give this subject careful consideration with a view to negotiating modifications of the existing extradition treaties which will enable the United States to extradite persons charged with using the United States mails to defraud. It seems to me that if foreign nations are willing to allow extradition of persons charged with the substantive crime of fraud under state laws, they should offer no objection to the extradition of persons charged with using the mails of the United States for that purpose.

Respectfully yours,

/s/ William D. Mitchell
WILLIAM D. MITCHELL
Attorney General

[The Secretary of State]

February 28, 1933

In reply refer to
Le

The Honorable

The Attorney General.

Sir:

I have received your letter of February 24, 1933, in which you call attention to the fact that recently several persons charged in this country with using the mails to defraud have fled to foreign countries to escape prosecution and you urge that steps be taken looking to agreements with foreign countries to render this offense extraditable.

As you recognize, the offense in question is not covered by any of the extradition treaties of the United States and my information indicates that this condition is due to the fact that countries, other than the United States, have not enacted laws defining and penalizing as such the offense in question.

The experience of this Department seems to show that generally speaking governments are unwilling to agree to extradite persons upon charges of an offense which is not defined and penalized in their own laws and in view of this it may well prove impracticable to bring about such agreements with foreign countries as you desire to be made. However, the Department is making a start in the desired direction by a request to the Government of Canada, which country, because of its proximity to the United States, is probably resorted to by fugitives from our justice more frequently than any other, that it agree with this country to add to the list of offenses now covered by extradition treaties in force

as between the two countries, the offense of using the mails to defraud.

Upon receipt of a response from the Canadian Government the matter in which you are interested will be given further consideration and your Department will be informed in the premises.

Very truly yours,

/s/ Henry L. Stimson
HENRY L. STIMSON

APPENDIX K

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U.S. Constitution, Fourth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Fifth Amendment, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Sixth Amendment, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Eighth Amendment, provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 18 U.S.C. § 1343 provides:

Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18 U.S.C. § 2314 provides:

* * * *

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . .

Title 18 U.S.C. § 3651 provides:*

Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

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* The quoted language is the version of the statute applicable at sentencing. Changes not material here later became effective.

The court may invoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

. . .

Federal Rule of Criminal Procedure 41(e) provides:

Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

The Treaty of Extradition Between the United States and Switzerland, 31 Stat. 1928, provides:

Treaty between the United States and Switzerland for the extradition of criminals. Signed at Washington May 14, 1900; ratification with amendments advised by the Senate June 5, 1900; ratified by the President

February 25, 1901; ratified by Switzerland January 21, 1901; ratifications exchanged at Washington February 27, 1901; proclaimed February 28, 1901.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas a Convention between the United States of America and the Swiss Confederation providing for the extradition of criminals was concluded and signed by their respective Plenipotentiaries at Washington on the 14th day of May, one thousand nine hundred, the original of which Convention, being in the English and French languages is, as amended by the Senate of the United States, word for word as follows:

The Government of the United States of America and the Federal Council of the Swiss Confederation, with a view to the better administration of justice, have resolved to conclude a new Convention for the extradition of fugitive criminals, and, for that purpose, have appointed as their Plenipotentiaries, to wit:

The President of the United States of America: John Hay, Secretary of State of the United States; the Federal Council of the Swiss Confederation: J. B. Pioda. Envoy Extraordinary and Minister Plenipotentiary of Switzerland to the United States; Who, after communicating to each other their full powers, which were found in good and due form, have agreed upon the following Articles.

ARTICLE I.

The Government of the United States of America and the Swiss Federal Council bind themselves mutually to surrender such persons as, being charged with or convicted of any of the crimes or offenses enumerated here-

inafter in Article II, committed in the territory of one of the contracting States, shall be found in the territory of the other State: Provided that this shall be done by the United States only upon such evidence of criminality as, according to the laws of the place where the fugitive or person shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed. In Switzerland, the surrender shall be made in accordance with the laws in force in that country at the time of the demand.

Neither of the two Governments, however, shall be required to surrender its own citizens.

ARTICLE II.

Extradition shall be granted for the following crimes and offenses, provided they are punishable both under the laws of the place of refuge and under those of the State making the requisition, to wit:

1. Murder, including assassination, parricide, infanticide and poisoning; voluntary manslaughter.

2. Arson.

3. Robbery; burglary; housebreaking or shop-breaking.

4. The counterfeiting or forgery of public or private instruments; the fraudulent use of counterfeited or forged instruments.

5. The forgery, counterfeiting or alteration of coin, paper-money, public bonds and coupons thereof, bank notes, obligations, or other certificates or instruments of credit, the emission or circulation of such instruments of credit, with fraudulent intent; the counterfeiting or forgery of public seals, stamps or marks, or the fraudulent use of such counterfeited or forged articles.

6. Embezzlement by public officials, or by other persons, to the prejudice of their employers; larceny; obtaining money or other property by false pretences; receiving

money, valuable securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained. The amount of money or the value of the property obtained or received by means of such criminal acts, must exceed 1000 francs.

7. Fraud or breach of trust, committed by a fiduciary, attorney, banker, administrator of the estate of a third party, or by the president, a member or an officer of a corporation or association, when the loss involved exceeds 1000 francs.

8. Perjury; subornation of perjury.

9. Abduction; hape; kidnapping of minors; bigamy; abortion.

10. Wilful and unlawful destruction or obstruction of railroads, endangering human life.

11. Piracy; wilful acts causing the loss of destruction of a vessel.

ARTICLE III.

Extradition shall likewise be granted for an attempt to commit, or participation in, any of the crimes and offenses enumerated in Article II, provided such attempt or participation is punishable in the United States as a felony, and in Switzerland with death, or confinement in a penitentiary or workhouse.

* * * *

ARTICLE IX.

No person surrendered by either of the Contracting States to the other shall be prosecuted or punished for any offense committed before the demand for extradition, other than that for which the extradition is granted, unless he expressly consents to it in open Court, which consent shall be entered upon the record, or unless, having been at liberty during one month after his final release to leave the territory of the State making the demand, he has failed to make use of such liberty.

The State to which a person has been surrendered shall not surrender him to a third State, unless the provisions contained in the first paragraph of the present Article have been fulfilled.

* * * *

ARTICLE XII.

All articles seized which are in the possession of the person demanded, at the time of his arrest, shall, at the time of the extradition be delivered up with his person, and such delivery shall extend, not only to articles acquired by means of the offense with which the accused is charged, but to all other articles that may serve to prove the offense.

The rights of third parties to the articles in question shall, however, be duly respected.

* * * *

In witness whereof, the respective Plenipotentiaries have signed the foregoing Articles, and have affixed their seals.

Done in duplicate at Washington, in the English and French languages, the 14th day of May 1900.

JOHN HAY [SEAL.]

J. B. PIODA [SEAL.]

And whereas the said Convention as amended by the Senate of the United States has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Washington, on the 27th day of February, one thousand nine hundred and one;

Now therefore, be it known that I, William McKinley, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof, as amended, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington, this twenty-eighth day of February in the year of Our Lord one thousand nine hundred and one, and of the Independence of the United States the one hundred and twenty-fifth.

WILLIAM MCKINLEY

[SEAL.]

By the President:

JOHN HAY

Secretary of State.

[French text omitted.]

No. 87-703

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the attachment of certain of petitioner's assets by a civil litigant deprived petitioner of the effective assistance of counsel, where he was represented by his chosen retained counsel at every stage of his trial and where he made no complaint at any stage that he needed those assets to present an effective defense.

2. Whether petitioner is entitled to seek the return of seized property under Fed. R. Crim. P. 41(e) after he no longer has a legal ownership interest in that property.

3. Whether petitioner was unlawfully extradited from Switzerland.

4. Whether the district court properly ordered petitioner to pay restitution to a defrauded victim who was named in the indictment, specified in the jury instructions, and whose loss from petitioner's fraud was clearly demonstrated at trial.

5. Whether the district court abused its discretion in conditioning petitioner's probation on his agreement not to leave the United States until the court's restitution order was satisfied.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6a-24a) is reported at 814 F.2d 1329. The court's amendments to its opinion (Pet. App. 1a-5a) are reported at 827 F.2d 424.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1987, and amended on September 3, 1987. A petition for rehearing was denied on September 3, 1987. The petition for a writ of certiorari was filed on October 30, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of interstate transportation of a person in the execution of a scheme to defraud that person, in violation of 18 U.S.C. 2314 (Count One), and wire fraud, in violation of 18

U.S.C. 1343 (Count Two). The district court sentenced petitioner to imprisonment for a year and a day, to be followed by a term of five years' probation. The court also fined petitioner a total of $11,000 and ordered him to pay restitution of $34,501.26 and $458,373.89, respectively, to two of his victims. The court of appeals affirmed (Pet. App. 1a-24a).

1. Petitioner is a Belgian citizen. Between 1979 and 1981, he participated with two American citizens in a scheme to defraud a Belgian stockbroker and a Belgian corporation of $3.6 million (Pet. App. 7a). Petitioner and his two American accomplices, Alan Blair and Gerald Bilton, falsely represented that they owned the property on which an apartment complex near Kansas City, Missouri was built (Gov't C.A. Br. 4-7, 8-9). In reliance on that representation, the stockbroker, Roger Biard, lent petitioner $1 million to finance the renovation and conversion of the property to condominiums. The owners of the corporation, the Vanden Stock family, agreed to buy the renovated property for $11.5 million. The family paid $1.2 million of that amount in early installments (*id.* at 5, 10). Petitioner used the initial receipts from the Vanden Stock family to make two payments on the Biard loan, but he defaulted on the final $800,000 that was due (*id.* at 6-7). Meanwhile, the Vanden Stock family became concerned about its investment and sought to renegotiate the conditions under which it could terminate its purchase agreement; Blair received approximately $1.4 million for entering into an amended agreement with the Vanden Stock family (*id.* at 10-11). Petitioner and Blair later refused a demand by the Vanden Stock family that their money be refunded to them (*id.* at 11).

Petitioner, Blair, and Bilton were indicted in October 1984 for wire fraud, interstate transportation of a victim of fraud, and conspiracy to commit fraud (Pet. App. 7a-8a). Because petitioner resides in Belgium and because

Belgium does not extradite its nationals, the Justice Department initially could not proceed against him (*id.* at 8a n.1). When the Justice Department later learned that petitioner would be traveling to Geneva, Switzerland, on a brief business trip, however, the Department filed a provisional arrest request with Swiss authorities, pursuant to Article VI of the Treaty on Extradition, May 14, 1900, between the United States and Switzerland, 31 Stat. 1931.

Swiss authorities arrested petitioner in Geneva on January 14, 1985, as he stepped off his plane (Pet. App. 8a). In addition, the Swiss authorities seized two stock certificates that petitioner had been keeping in his Swiss accounts, based on the Justice Department's representation that it had probable cause to believe the certificates either were acquired by means of the fraud or would serve to prove the offense (*ibid.*). In March 1985, the Department of State filed a formal request for petitioner's extradition (*ibid.*).

Petitioner raised a challenge in the Swiss courts both to his extradition and to the seizure of his stock certificates (Pet. App. 8a-9a). On September 25, 1985, the Swiss Federal Tribunal, Switzerland's highest court, ordered that petitioner be extradited on the substantive charges of wire fraud and interstate transportation of a victim of fraud, and that the stock certificates be transmitted to the United States; the court declined to approve extradition on a conspiracy count. The Swiss court ruled as follows (No. A214/85, at 11-14 (official American Embassy translation)):

> (a) According to the extradition request, the petitioner is charged with having acted in concert with at least two American nationals to defraud certain Belgian financiers of a total of $3.6 million by falsely representing a real estate transaction which he was obviously in no position to carry out. Such facts constitute a fraudulent scheme to obtain money or other property by false pretenses, as defined in Article II,

Paragraph (6) of the Treaty. If committed in Switzerland, they would clearly fall within the scope of Section 148 of the Swiss Penal Code prohibiting fraud.

However, based on the statutes or the legal basis of such charge cited in the request for extradition, the petitioner claims that the Requesting State does not intend to punish him for fraud, but merely for having misused interstate communication facilities in the commission of such offense. This argument is invalid in that it fails to take into account the specificities of United States material criminal law, of the U.S. federalist system and of the separation of powers between federal law enforcement authorities and those of each State making up the Union.

* * * * *

Thus, contrary to the argument expressed by the petitioner in the appeal, the aim of the two main statutes cited in the extradition request is to punish fraudulent acts as defined by Section 148 of the Penal Code. The fact that the extraditable person used interstate communication or transportation facilities is invoked essentially as justification for the application of federal legislation and the jurisdiction of the federal authorities. In other words, if the scheme to defraud had been carried out strictly within the territorial boundaries of any given state, the perpetrator would be subject to the penalties contemplated under the laws of that state and such act would fall within the jurisdiction of the state law enforcement authorities. * * * Thus, the statutes merely set forth the conditions governing the punishment of the offense in question within the Requesting State, which in no way affect the obligation of the Requested State to lend assistance in such matter, so long as the facts

> charged are punishable under the laws of both States as required by Article II of the Treaty.

Petitioner was extradited the next day (Pet. App. 9a).

2. Before the stock certificates arrived in the United States, petitioner moved in the district court for their return, pursuant to Fed. R. Crim. P. 41(e) (Pet. App. 9a). The district court preliminarily denied petitioner's motion on October 28, 1985, and instead ordered that the certificates be held "pending litigation of this matter or further order of the Court" (Nov. 12, 1985 Tr. 20; Pet. App. 9a). The certificates arrived in the United States sometime between October 28, 1985, and November 12, 1985, and were deposited with the clerk of the court (Nov. 12, 1985 Tr. 11).

On November 12, 1985, the court held another hearing on petitioner's Rule 41(e) motion (Nov. 12, 1985 Tr. 11-12). At that time, the court was informed that a civil suit had been filed against petitioner in the district court, that the plaintiffs in that civil action were seeking a writ of attachment against the Swiss certificates, and that their request for a writ of attachment was scheduled for argument before a magistrate later that afternoon (*id.* at 14, 16). Petitioner agreed that the outcome of the attachment proceeding was relevant to the court's decision on the Rule 41(e) motion, because he was "not asking [the court] to order that it go back to [him]" (*id.* at 24; see also *id.* at 25-26), and because his Rule 41(e) motion would no longer matter if a writ of attachment was issued in the civil case (*id.* at 28). The district court accordingly denied the motion pending a decision in the civil action on the application for a writ of attachment (*id.* at 27, 35-36). Later that day, the magistrate assigned to the civil proceeding entered an order attaching the seized assets, which were then deposited in the registry of the court in connection with the civil case.

3. The case against petitioner, Blair, and Bilton went to trial on November 19, 1985 (Pet. App. 9a). The jury

found all three defendants guilty on the two substantive counts, and the district court entered judgment for the government on January 22, 1986 (*id.* at 10a). At that time, the court sentenced petitioner to a $10,000 fine and imprisonment for a year and a day on the first count, crediting him for the 373 days that he had already served in pretrial confinement, and to a $1,000 fine and a five-year probation term on the second count (*ibid.*). As conditions of probation on the second count, the court ordered petitioner (1) to pay restitution of $34,501.26 to Biard and $458,373.89 to Roger Vanden Stock, a member of the Vanden Stock family; (2) not to engage in any real estate transactions, except to liquidate his property, or any wire transfers, except to his family; and (3) not to leave the United States until the restitution had been paid (*ibid.*). Finally, on motion by the government and petitioner, the district court released the stock certificates into the joint custody of the government and petitioner's counsel for purposes of liquidation and ordered that the excess above the amount due for restitution be redeposited with the registry of the court for attachment by the parties in the related civil action (*id.* at 11).

4. The court of appeals affirmed and remanded for modification of the terms of probation (Pet. App. 1a-24a). Initially, it rejected petitioner's argument that his extradition was improper because "the Treaty does not identify wire fraud and interstate transportation of a victim of fraud as extraditable offenses" (*id.* at 12a). The court noted that, while "[t]he Treaty does not expressly name these specific offenses," it does "include[] 'obtaining money or other property by false pretenses [and] receiving money * * * knowing the same to have been * * * fraudulently obtained' " (*ibid.* (quoting Treaty, art. II, para. 6, 31 Stat. 1930)). Applying well-settled principles of extradition law, the court of appeals deferred to the deci-

sion of Switzerland, the surrendering country, that the offenses charged in the indictment are offenses for which extradition is authorized by the Treaty (Pet. App. 12a-14a).

The court next rejected petitioner's argument that the district court erred in denying his motion under Fed. R. Crim. P. 41(e) for the return of the property that was seized from his Swiss accounts. The court noted that "the district court found, and [petitioner] admits, that he irrevocably transferred full title to the property to his own attorney and counsel for the United States, acting jointly, to satisfy his restitution condition" (Pet. App. 21a-22a). Moreover, it found that this transfer was made voluntarily (*id.* at 3a). The court noted that petitioner had "sought and willingly complied with the [transfer] order" in order that he might be permitted to leave the country and return to Belgium (*ibid.*). Accordingly, it concluded that, "[a]lthough [petitioner] remains the beneficial owner of the assests and any proceeds derived from their sale, he has not demonstrated entitlement to lawful possession of the assets [and] [r]eturn of the assets under Rule 41(e) is therefore inappropriate" (*id.* at 4a). The court declined to "express [a] view on whether the seizure was illegal" (*ibid.*), reasoning that "resolution of that question is unnecessary to the disposition of his Rule 41(e) challenge on appeal" (*id.* at 4a-5a).

The court also rejected petitioner's argument that he should not have been required to make restitution to Roger Vanden Stock (Pet. App. 23a). It noted that "the entire scheme to defraud Biard and the Vanden Stock family of 3.6 million dollars was alleged in the indictment counts for which [petitioner] was convicted" and that, "[b]y specifying the total amount alleged to have been fraudulently obtained in the indictment, 'the indictment gave [petitioner] fair notice of the damages the government intended to prove he caused his victims to suffer and placed a ceiling above which a restitution order would have been improper' " (*ibid.* (citation omitted)). The court

thus concluded that "[i]t was not improper * * * to impose restitution for both Biard and Vanden Stock" (*ibid.*).

Finally, the court of appeals remanded the case to the district court with instructions to consider modifying the conditions of petitioner's probation (Pet. App. 24a). The court noted that, in response to an earlier remand order, "the district court [had] found that [petitioner's] continuing presence in this country no longer serves any probationary purpose" (*ibid.* (footnote omitted)). It thus concluded that petitioner's "probation may be modified to allow him to return to Belgium" (*ibid.*).

ARGUMENT

1. Petitioner initially contends (Pet. 10-16) that the seizure and retention of his stock certificates violated his Sixth Amendment right to effective assistance of counsel, because it allegedly interfered with his ability to defend against the criminal charges for which he was indicted. This contention has no merit and does not warrant review by this Court.

As a preliminary point, petitioner did not press this issue in the same fashion and on the same grounds as he has done in this Court. In seeking return of the stock certificates in the district court, petitioner did not suggest, other than in passing (R. 277uu, 277yy), that he needed the assets for his defense; counsel for petitioner subsequently disavowed that he was asking that the stock certificates be returned to petitioner (Nov. 12, 1985 Tr. 24-27). Moreover, petitioner did not complain during trial or in his motion for a new trial that the seizure and detention of his assets impaired his ability to present a defense. In the Ninth Circuit, he gave the issue only the slightest attention; his total discussion of the issue was contained in the third paragraph of a footnote in his brief. See Pet. C.A. Br. 27-28 n.40. And even then, petitioner did not suggest

that he had been denied the effective assistance of counsel, but rather that the government's alleged effort to *deny* him the effective assistance of counsel had failed because counsel had represented him in spite of the retention of the stock certificates. Nowhere in his brief did petitioner suggest that the retention of the certificates made it impossible to present his defense effectively. The Sixth Amendment claim that petitioner now seeks to raise is thus very different in character.[1] This Court should not consider what amounts to a new issue that petitioner has failed to litigate below. See *Youakim* v. *Miller,* 425 U.S. 231, 234-235 (1976); *United States* v. *Ortiz,* 422 U.S. 891, 898 (1975).

Even assuming that the Sixth Amendment question is properly before the Court, the petitioner errs in suggesting (Pet. 10-11) that the implicit approval of the seizure and retention of assets by the court below conflicts with the decisions of the Fourth and Fifth Circuits in *United States* v. *Harvey,* 814 F.2d 905 (4th Cir. 1987), and *United States* v. *Thier,* 801 F.2d 1463 (1986), modified, 809 F.2d 249 (5th Cir. 1987), respectively. *Harvey* and *Thier* are attorney-fee forfeiture cases in which the government, by asserting a priority claim over a defendant's assets, reduced through state action the defendant's access to funds for his defense.[2] In this case, by contrast, although the initial Swiss seizure followed a government request, the court retained the assets because private parties had sought to attach them to protect any future judgment they

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[1] For example, this is the first time that petitioner has asserted (Pet. 15 n.10) that he was unable to depose a defense witness because of insufficient funds.

[2] As petitioner acknowledges, the *Harvey* case is now pending before the en banc Fourth Circuit, which granted the government's petition for en banc review. The panel opinion in *Harvey* is therefore of no precedential value even within the Fourth Circuit.

might obtain against petitioner in their parallel civil action. Nothing in *Harvey* or *Thier* suggests that the Sixth Amendment restricts the ability of private parties to attach assets of a criminal defendant against whom the private parties are litigating.[3]

In any event, the record in this case makes it quite clear that petitioner has received the effective assistance of counsel and that no Sixth Amendment violation has occurred. Petitioner has been represented by counsel of his choice, lawyers from the law firm of Williams & Connolly, from the beginning of pretrial proceedings through the filing of the petition for a writ of certiorari in this Court. There is no basis in the record for suggesting that counsel's effectiveness has been diminished by the seizure and detention of the stock certificates. Thus, while a timely Sixth Amendment claim arguably would not be moot (*United States* v. *Harvey,* 814 F.2d at 929 n.11), it clearly would fail on the merits. See *United States* v. *Lewis,* 759 F.2d 1316, 1327 (8th Cir.), cert. denied, 474 U.S. 994 (1985); *United States* v. *Rubio,* 404 F.2d 678, 681 (7th Cir. 1968), cert. denied, 394 U.S. 993 (1969); *United States* v. *Brodson,* 241 F.2d 107 (7th Cir.), cert. denied, 354 U.S. 911 (1957).

2. Petitioner next contends (Pet. 16-21) that the court of appeals erred in finding that he waived his claim under Rule 41(e) for return of property by ceding ownership of the stock certificates to his attorneys. This contention also has no merit.

Rule 41(e) (emphasis added) states that "[a] person ag-

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[3] The petition need not be held pending the disposition of *Van Cauwenberghe* v. *Biard,* cert. granted, No. 87-336 (Nov. 9, 1987). That case, which arises out of the separate civil action in which petitioner is involved, presents the questions whether an order denying a motion to dismiss on grounds of forum non conveniens is an immediately appealable order, and whether an order denying an extradited person's claim of absolute immunity from civil process is immediately appealable. The resolution of those questions would not affect the proper disposition of this case.

grieved by an unlawful search and seizure may move the district court for the district in which property was seized for the return of the property on the ground that *such person is entitled to lawful possession* of the property which was illegally seized." As noted by the court of appeals (Pet. App. 3a-4a), however, petitioner is not entitled to lawful possession of the property that he alleges was illegally seized; he ceded his ownership interest in the certificates to his attorneys in order that he might satisfy the terms of his probation and be allowed an early return to Belgium. Thus, under the plain terms of Rule 41(e), petitioner is not entitled to have the stock certificates returned to him, whether or not he was aggrieved by an unlawful search and seizure or other constitutional deprivation. Rule 41(e) does not entitle a person to have assets returned to him when the person is not lawfully entitled to possess those assets. See *Sovereign News Co.* v. *United States,* 690 F.2d 569, 577 (6th Cir. 1982), cert. denied, 464 U.S. 814 (1983); *United States* v. *Francis,* 646 F.2d 251, 263 n.8 (6th Cir.), cert. denied, 454 U.S. 1082 (1981).

Moreover, contrary to petitioner's argument (Pet. 16-21), the court of appeals followed the correct path in declining to decide whether the initial seizure of the property was lawful. It may be, as petitioner asserts (Pet. 16-18), that any person with a legally cognizable interest in private property may prove in a civil action that property has been unconstitutionally seized and thereby obtain return of that property (or damages for its unlawful seizure). It may also be, as petitioner further asserts (Pet. 18-21), that a criminal defendant need not be entitled to lawful possession of property in order to prove that it was unconstitutionally seized and therefore should be excluded from evidence in his criminal trial. But this is not a civil action by petitioner for return of the property or for damages, and the government has not sought to introduce the stock certificates as evidence in this criminal case. Petitioner has merely sought to have the government return

the stock certificates to him pursuant to Rule 41(e). Entitlement to lawful possession of the property is a necessary condition for issuance of such an order under Rule 41(e), and the government has opposed the return of the property under that rule. Since petitioner is not entitled to lawful possession of the property, he is not entitled under Rule 41(e) to the relief he seeks. Accordingly, the court of appeals was correct in holding that resolution of the legality of the initial seizure was "unnecessary to the disposition of his Rule 41(e) challenge on appeal" (Pet. App. 5a). Accord *United States* v. *Francis,* 646 F.2d at 263 n.8.

3. Petitioner next claims (Pet. 22-27) that the court of appeals created a conflict among the circuits by holding that he could not raise the illegality of his extradition as a defense in his criminal trial. This claim misstates the conclusion of the court below.

The court of appeals did not hold that petitioner may not raise the illegality of his extradition as a defense in his criminal trial. Rather, it held that deference was due to the determination by Switzerland, the asylum country, that petitioner was charged with an offense covered by the Swiss-American extradition treaty. That holding is plainly correct. See *Johnson* v. *Browne,* 205 U.S. 309, 316 (1907); *McGann* v. *United States Bd. of Parole,* 488 F.2d 39, 40 (3d Cir. 1973), cert. denied, 416 U.S. 958 (1974).

None of the decisions that petitioner cites (Pet. 22-23) are to the contrary. Those decisions hold that, under the rule of "specialty," an accused may be tried only for the offense for which he was delivered up by the asylum country. See, *e.g., United States* v. *Rauscher,* 119 U.S. 407, 422-423 (1886); *United States* v. *Thirion,* 813 F.2d 146, 151 (8th Cir. 1987). That principle is not in any way of-

fended when, as here, a defendant is tried on the precise charges that were presented to the asylum country.[4]

Even without according any deference to the decision of the Swiss Federal Tribunal, it is clear that petitioner's extradition did not violate the treaty between Switzerland and the United States and therefore was not illegal. Article II, paragraph 6, of the Treaty permits extradition for obtaining money or other property by false pretenses (31 Stat. 1930; Pet. App. 48a). The indictment in the instant case, a copy of which was made available to the Swiss Federal Tribunal (along with the operative statutes of the United States), charges that petitioner obtained money and property by wire fraud and interstate transportation of a victim of fraud. In other words, the indictment alleges the kind of offense that is made unlawful in Switzerland and that is specifically included in the extradition treaty; the federal crime parallels the Swiss offense except for an additional element required only in federal prosecutions—the nexus with interstate commerce. But the absence of direct equivalency does not render the extradition unlawful. See *Collins* v. *Loisel,* 259 U.S. 309, 312 (1922); *Kelly* v. *Griffin,* 241 U.S. 6, 14 (1916); *Wright* v. *Henkel,* 190 U.S. 40, 58 (1903); *In re Extradition of Russell,* 789 F.2d 801, 803-804 (9th Cir. 1986); *Quinn* v. *Robinson,* 783 F.2d 776, 783 (9th Cir. 1986), cert. denied, No. 86-9 (Oct. 14, 1986); *Demjanjuk* v. *Petrovsky,* 776 F.2d 571, 579 (6th Cir. 1985), cert. denied, 475 U.S. 1016

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[4] *Shapiro* v. *Ferrandina,* 478 F.2d 894 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973), does not conflict with the decision below; the *Shapiro* case involved a request to extradite an individual from this country to another country, rather than vice versa. As a tribunal of the asylum country, the court in *Shapiro* therefore engaged in a close analysis of the question whether the offense charged in the foreign state was covered by the pertinent extradition treaty. That analysis would not have been necessary if this country had been the requesting country and a determination of extraditability had been made by a court of the asylum country.

(1986); *Messina* v. *United States,* 728 F.2d 77, 79 (2d Cir. 1984); *Cucuzzella* v. *Keliikoa,* 638 F.2d 105, 108 (9th Cir. 1981); *Brauch* v. *Raiche,* 618 F.2d 843, 850-851 (1st Cir. 1980).[5]

4. Petitioner next contends (Pet. 27-29) that the court of appeals erred in approving the award of restitution to Roger Vanden Stock. But that contention is based upon the false premise that Vanden Stock was simply a witness in this criminal case. In fact, the indictment clearly charges that Vanden Stock was a victim of fraud by petitioner. Thus, Count One of the indictment, paragraph 5, alleges that petitioner and his co-defendants "devised and intended to devise and employ a scheme and artifice to defraud Roger Biard and the Vanden Stock family (hereinafter victim investors) of approximately $3.6 million by means of false and fraudulent pretenses, representations and promises * * *." Paragraphs 6, 7, and 10 of Count One restate the total sum that was obtained from the "victim investors." Paragraph 8 sets forth the various misrepresentations made by petitioner; it includes allegations of misrepresentations to the Vanden Stock family. And the final jury instructions required the jury to find, for Count One, "each of the following elements beyond a reasonable doubt," including "that the defendant knowingly and willfully devised, intended to devise, or

[5] As petitioner asserts (Pet. 25-26), the Attorney General and the Secretary of State in 1933 were of the view that direct equivalency was required and, accordingly, that mail fraud and wire fraud were not extraditable offenses. But that view is no longer the official position of the government of either the United States or Switzerland. See *Government of the United States* v. *McCaffery*, [1984] 1 W.L.R. 867 (United States appealed successfully to the British House of Lords from magistrate order denying extradition for mail fraud on the ground that England has no equivalent jurisdictional element); Swiss Federal Tribunal, No. A 214/85 (Sept. 25, 1985), at 11-14 (the fact that United States has a federal system and includes an interstate commerce element in the definition of its crime out of respect for jurisdictional boundaries does not change equivalency of offenses).

joined a scheme or artifice to defraud or to obtain money by false pretenses or representations, specifically a scheme or artifice to defraud Roger Biard *and the Vanden Stock family* of approximately $3.6 million" (Tr. 3477 (emphasis added)).[6] Thus, the indictment and the jury instructions, as well as the evidence presented at trial, identified the members of the Vanden Stock family as defrauded victims, and petitioner clearly was convicted of defrauding them. Under these circumstances, it was entirely proper for the court to order that restitution be paid to Roger Vanden Stock. See *United States* v. *Sleight*, 808 F.2d 1012, 1018-1019 (3d Cir. 1987); *United States* v. *Woods*, 775 F.2d 82, 88 (3d Cir. 1985); *United States* v. *Whitney*, 785 F.2d 824, 826 (9th Cir. 1986).

5. Finally, petitioner claims (Pet. 29-30) that the district court lacked the authority to order him to remain in the United States until the restitution award was paid. The district court initially found that, because petitioner had transferred the stock certificates to his attorney and the government for purposes of paying the restitution judgment, "no further probationary purpose is to be served by retaining [petitioner] in the United States" (Pet. App. 37a-38a). That finding led the court of appeals to remand the case to the district court to consider modifying the terms of probation (*id.* at 24a). Petitioner advises that the district court on remand has made a new finding that the value of the stock certificates could decline before the award is satisfied and that petitioner's continued presence in the United States is therefore necessary to ensure final compliance with the restitution order (see Pet. 9).

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[6] As to Count Two, the court repeated the requirement that the jury find a scheme to defraud both Biard and Vanden Stock (Tr. 3482).

The court of appeals apparently has not had occasion to consider the most recent order by the district court. Petitioner therefore is in effect asking this Court to review the district court's order on remand without the benefit of court of appeals review of that order. Petitioner has given no reason to justify such an unusual exercise of this Court's certiorari jurisdiction and, for that reason alone, review of this issue is unwarranted.

In any event, even if the district court's order were properly before the Court, it would be lawful. The requirement that petitioner remain in this country until the restitution is paid is reasonably related to a legitimate purpose of the order of probation and is therefore within the sentencing court's discretion. *United States* v. *Koenig*, 813 F.2d 1044, 1047 (9th Cir. 1987); *Higdon* v. *United States*, 627 F.2d 893, 897 (9th Cir. 1980). Since the probation term is less onerous than the term of imprisonment the court could have imposed in its place, and since under a sentence of imprisonment petitioner could not have left the United States, it is difficult to understand how the requirement that petitioner remain in the United States as a condition of his probation could constitute a cruel and unusual punishment or a violation of due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

NO.
87-703

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

WILFRIED VAN CAUWENBERGHE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR PARTICIPATION OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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The National Association of Criminal Defense Lawyers (NACDL), through counsel, moves this Court for leave to participate as amicus curiae in support of the grant of a writ of certiorari. This motion proceeds in accordance with Supreme Court Rule 36. This motion is made with the consent of the Petitioner, Wilfried Van Cauwenberghe. Counsel has requested consent from Respondent, but has not obtained Respondent's answer at this time. In the event that Respondent consents, the written consent of all parties will be forwarded to this court. In the event that Respondent does not consent, NACDL respectfully requests leave to file an amicus curiae brief for consideration with Petitioner's petition for a writ of certiorari. In support of this motion, NACDL states:

1. The National Association of Criminal Defense Lawyers (NACDL) is a

District of Columbia non-profit corporation with a membership comprised of more than 5,000 lawyers and law professors from every state, most of whom are actively engaged in defending criminal prosecutions and protecting individual rights. NACDL was founded 26 years ago to promote the study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of criminal defense lawyers and criminal justice professionals. Throughout NACDL's history, its members have worked to protect the rights and liberties of those accused of criminal offenses, and to promote the fair and proper administration of criminal justice. Consequently, NACDL concerns itself with the protection

of individual rights, the improvement of the criminal law, and the preservation of the integrity, independence, and competence of the defense lawyer in criminal cases.

2. The broad issue raised in this case involves the pretrial seizure and restraint and the potential for forfeiture of assets which an accused in a criminal case desired to use to retain private counsel to defend him. The practice of restricting an individual's assets to prevent those assets from being used to retain counsel or to pay necessary expenses in defending against criminal charges, threatens the Fifth and Sixth Amendment rights of those accused persons. It is the view of NACDL that courts must be hesitant to approve the pretrial restraint of assets where those assets are to be used for criminal defense purposes.

3. This legal issue should be resolved by this Court, in that it presents a question of substantial importance to the entire criminal justice system. Resolution of this issue will have a profound impact upon the administration of criminal justice in the courts and, therefore, upon the members of NACDL. It is the intention of NACDL, through an amicus brief, to advise this Court of the constitutional implications of the decision below for which certiorari review is sought. NACDL has involved itself as amicus curiae in a number of asset seizure cases in the federal appellate courts.

For the foregoing reasons, the National Association of Criminal Defense Lawyers respectfully moves this Court for leave to

participate as amicus curiae and file its accompanying brief.

Respectfully submitted,

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Suite 500
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By: Benedict P. Kuehne
NEAL R. SONNETT
BENEDICT P. KUEHNE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 30th day of November, 1987 to the following parties: John G. Kester, Esq., Williams & Connolly, Hill Building, 839 17th Street, N.W., Washington, D.C. 20006; and to Charles Fried, United States Solicitor General, Department of Justice, Main Building,

Suite 5143, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530.

Benedict P. Kuehne

By: _____

NEAL R. SONNETT
BENEDICT P. KUEHNE

No. 87-703

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

The Government's brief is repeatedly and demonstrably not faithful to the record. The issues were properly presented and preserved below and in this Court. They are important to the administration of federal criminal justice.

I. GOVERNMENTAL SEIZURE AND RETENTION OF AN INDICTED PERSON'S PROPERTY.

A. "Inherent Authority."

1. The Government's brief says nothing at all that might explain where it supposedly gets the "inherent" power it asserted and applied here, R. 107, to seize and hold property that is concededly not related to any crime, simply because the owner was indicted.

2. The Government tries to invent a different record when it asserts (with no citation) that petitioner's assets were "deposited in the registry of the court in connection with the civil case." G. Br. 5. The record is utterly clear that the trial Judge (who had no jurisdiction of the civil case, which was before a different judge) accepted the Government's application that this defendant should not

be allowed to use his own money to pay his own lawyer, and that instead his savings would be "preserved," R. 107, to pay his future sentence—a ruling impossible to square with *Powell* v. *Alabama*, 287 U.S. 45 (1932), not to mention the presumption of innocence. The property was taken by the Government. R. 83-87, 107. On the Government's motion the Judge signed an order in this case sequestering petitioner's property *three weeks before the civil case was even filed*, R. 25-26, and did not amend it until his post-trial order directing the assets be liquidated "[i]n accordance with the sentence of this Court." Pet. Cert. 33a.[1] It is simply undeniable that the assets were seized in the extradition, held by the Government, ordered sequestered by the Judge in this case, ordered sold to carry out the sentence, and remain under his order. R. 63-69, 74, 83-87, 277pp-rr, 277ww, 283, 286, 791-92, 1004-07.[2]

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[1] A magistrate later signed an *ex parte* order in response to the civil plaintiff's request for attachment under California law "in the event the district court orders the stock certificates returned to Van Cauwenberghe." J.A., No. 87-336, at 27. The judge in this case a week later commented, referring to what he described as petitioner's property "that the Government tied up," that "it still sits in the registry of the court subject to my order. If you don't believe it, draw up an order and I will tell the magistrate." R. 11/18/85 23. After the sentencing the assets left California in January 1986 pursuant to the criminal judge's order for title transfer and efforts at liquidation, and have not returned. A month later the civil plaintiff obtained another *ex parte* order under California law purporting prospectively to attach any assets of petitioner "which will be" in California, J.A., No. 87-336, at 76; California law does not authorize attachment of property outside the state. No valid attachment ever was perfected.

[2] The Government's assertion that "Petitioner agreed that the outcome of the attachment proceeding was relevant to the Court's decision on the Rule 41(e) motion" G. Br. 5, or "disavowed" his endless effort to have his property returned, G. Br. 8, again, is clearly contradicted by the record. Petitioner in fact objected strenuously and repeatedly to any consideration of the civil proceeding, R. 11/12/85 18, 23, 24, 26, and the judge himself said, "That [the civil case] will not in any way effect [sic] the handling of this case." *Id.* 36. The context in which petitioner's counsel at one argument

3. The Government sweepingly argues:

> "petitioner is not entitled to have the stock certificates returned to him, whether or not he was aggrieved by an unconstitutional search and seizure or other constitutional deprivation." G. Br. 11.

But "[j]urisdiction to return is not dependent upon whether the matter falls within the compass of Fed. R. Crim.P. 41(e)." *United States* v. *Hubbard*, 650 F.2d 293, 303 n.27 (D.C. Cir 1980) Even the Sixth Circuit case on which the Government relies rcognizes all that is required for return under Rule 41(e) is "a property interest" *Sovereign News Co.* v. *United States*, 690 F.2d 569, 577 (6th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). The Government's position in this case would simply nullify the protections of the Constitution as well as the Federal Rules.[3]

---

said that he was not simply asking for return, *id.* at 24, was as explanation that he did not expect the court to hand the assets back without allowing the Government an opportunity to prove that they were evidence or fruit of a crime, *id.* at 23; in fact, he repeatedly challenged the Government to attempt to do so, challenges which the Government declined, see *id.* at 18, 19, 21, 22, 29, 30, 34, 41. Petitioner again after the trial, R. 1004-1008, and at every stage of the appeal continued to press for return of his property.

[3] The Government's other new assertion in this Court that petitioner somehow "voluntarily," G. Br. 7, would give up all claim to property worth more than $1 million is on its face ridiculous. The record leaves no doubt that (1) the District Court ruled that petitioner must remain exiled in the United States until the nearly $500,000 restitution was paid, Pet. Cert. 36a; (2) petitioner asked for return of his assets so he could use part of them to pay the restitution, *id.*, 29a; (3) the District Court refused unless he transferred title in part to the government attorney, *id.*, 31a-32a; (4) petitioner, having no other way to pay the restitution and go home, complied. *Id.* 33a. After the petition for certiorari was filed herein, the Government stated that it now would allow petitioner to go home if he would instruct his attorney to transfer title to the assets to the clerk of the district court for disposition pursuant to any ruling of this Court, in exchange for giving up all claims for relief outside the United States. Because of the express *quid pro quo* nature, and because all his claims are expressly preserved, the legality of the exile condition remains at issue.

B. The Sixth Amendment Violation.

1. The Government misconceives the nature of petitioner's Sixth Amendment claim. Petitioner never contended that he was denied effective counsel, although his defense in other aspects was hampered.[4] The Sixth Amendment violation was the seizure of property that prevented paying counsel of choice—the very oldest and most central part of the right of counsel. *Powell* v. *Alabama*, 287 U.S. 45 (1932).[6] The District Court said, "he can change counsel if he can't afford you," R. 2771, and "if he hasn't any money, then we can appoint a public defender," *ibid.* Present counsel felt a professional obligation to continue to represent him nevertheless, serving unpaid in a four-week trial in a distant city, with substantial post-trial demands as well.[5] Not every counsel could do so. *Cf. Amicus* Brief of N.A.C.D.L., at 5, 24, 29-30. That does not preclude judicial review *United States* v. *Harvey*, 814 F.2d 905, 929 n.11 (4th Cir. 1987). Moreover, the District Court still holds the property and counsel are still unpaid.

2. As for the Government's inexplicable argument that the Sixth Amendment claim was not adequately raised below, the record shows that it was raised in both courts,

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[4] Petitioner informed the court that he needed the funds because "it is now very apparent to us that the defense witnesses will all or almost all be coming from Europe," and "there are other expenses." R. 277a, 277e. "Each witness, who has got to be brought over to this country is going to cost several thousand dollars." R. 277yy. The court said, "If you want them as your witnesses and want to pay their expenses over, you can have them." R. 9/30/85 14.

[5] The District Court's comment was, "They have a big firm. They run up nice, little computer runouts for all the time spent, so we will not worry about them." R. 9/30/85 66-67.

[6] Even the cases the Government cites emphasize the serious Sixth Amendment interest against seizing a defendant's assets in any circumstances, referring to such actions as "egregious" and "extreme sanctions." *United States* v. *Lewis*, 759 F.2d 1316, 1324 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985).

not once but repeatedly, and was the focus of oral arguments as well. Moving for return of his property, petitioner in his papers even quoted the very text of the Sixth Amendment; he said that continued withholding of his assets "would violate his right to 'the Assistance of Counsel for his defence' under the Sixth Amendment," R. 68, and that the Government's action was "depriving Mr. Van Cauwenberghe of funds to pay for his defense." R. 69. In his reply memorandum, he reiterated that "He needs the funds . . . in order to defend himself in this trial." *Id.* at 2. In open court, his counsel stated that "Mr. Van Cauwenberghe needs this money to defend himself," R. 277uu, that "Mr. Van Cauwenberghe needs this money for his defense," R. 277yy, that "he needs it now," *ibid.* and that the Government was "depriving Mr. Van Cauwenberghe of the assets to defend himself." R. 10/28/85 83. The trial court replied that "You want to get ahold of the stock so he has got something to pay attorneys fees with. I know what it is all about." R. 288. On appeal petitioner argued that the seizure "violates the Sixth Amendment" and cited two cases so holding. Br. App. 27-28. The Government's summary of petitioner's position to the Court of Appeals was as follows: "Van Cauwenberghe protests that the retention of these assets violated his fourth, fifth and sixth amendment rights." G. Opp. Reh. 3-4. On rehearing, petitioner called the Court of Appeals' attention to the Fourth Circuit's intervening decision in *United States* v. *Harvey*, *supra*, which came down after the oral argument in his case (he had cited the lower-court decision in his opening brief), and he again urged that "taking property so as to impair ability to retain and pay counsel is itself a Sixth Amendment violation." Pet. Reh. 5. On this record, it is no service to this Court for the Solicitor General of the United States to represent that the Sixth Amendment claim "amounts to a new issue that petitioner has failed to litigate below." G. Br. 9.

II. JUDICIAL ABSTENTION FROM INTERPRETATION OF U.S. TREATIES.

1. In the Court of Appeals, as that court explained, "the government insists that Van Cauwenberghe's argument is foreclosed by the Swiss Federal Tribunal's decision because 'determination of whether a crime is within the provisions of an extradition treaty is within the sole purview of the requested state'" quoting the Government's brief. Pet. Cert. 12a-13a. The Court of Appeals flatly held: "We agree." Pet. Cert. 13a. Reluctant now to have to defend in this Court the extreme ruling of the Court of Appeals, the Government now says that the court simply paid mild "deference" to a Swiss ruling.[7] G. Br. 12. But the holding, which the Government eagerly sought below, speaks for itself. The Ninth Circuit holds that foreign courts conclusively determine the meaning of U.S. treaties. It is a major turnabout in U.S. extradition law.

When a defendant enters this country by extradition, he "came to this country clothed with the protection which . . . the true construction of the treaty gave him." *Ker* v. *Illinois*, 119 U.S. 436, 443 (1886); *accord*, *Johnson* v. *Browne*, 205 U.S. 309, 317 (1907). A treaty is "equivalent to" a statute, interpreted "applying, as we must, our own law." *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 10, 18 (1936). Heretofore it has been a "rule of domestic law that the courts of this country will not try a defendant extradited from another coun-

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[7] The Government has submitted to this Court a flagrant mistranslation of a Swiss opinion. The opinion is not in the record because the Government heretofore denied its existence, in the face of petitioner's requests for a copy. See R. 43, 244, 246-47, 254, 262-66, 300-11, 334-36. Petitioner has obtained the French original. The Swiss court did *not* say, as the Government's "official" version claims, that the charges here "constitute a fraudulent scheme," G. Br. 3; it stated, on the contrary, based on what the Government told it, that the charges "constitute a defrauding" (*escroquerie*), *i.e.*, a consummated fraud—exactly the error as to U.S. law that petitioner has all along complained the Government intentionally induced. See pp. 3a-4a, *infra*; Pet. Cert. 23 & n.14.

try on the basis of a treaty obligation for a crime not listed in the treaty." *Shapiro* v. *Ferrandina*, 478 F.2d 894, 905 (2d Cir.), *pet'n for cert. dismissed*, 414 U.S. 884 (1973). The Government does not even cite three other cases so holding, see Pet. Cert. 22-23, apparently pretening that they do not exist. It also fails to discuss the Eighth Circuit holding that specifically rejected the very Government argument that the Ninth Circuit—acknowledging uncertainty, Pet. Cert. 13a—embraced here. *United States* v. *Thirion*, 813 F.2d 146, 151 n.5 (8th Cir. 1987).[8]

2. The Government's misdescription of an English decision, *United States Government* v. *McCaffery*, [1984] 2 A11 E.R. 570 [1984], 1 Weekly L.R. 867 (H.L.), is unconscionable. The Government concedes, G. Br. 14 n.5, that the Attorney General and Secretary of State in 1933 acknowledged that the 1900 extradition treaty with Switzerland does not cover the offenses for which the Government sought his extradition. The Government says (as if it would matter) that "that view is no longer the official position of the government of . . . the United States," G. Br. 14 n.5, and cites as authority the English grant of extradition for these offenses in the *McCaffery* case. What the Government's brief does not disclose to this Court is that the *McCaffery* ruling was under a *1972* treaty which contained a protocol that *explicitly added* these offenses. See [1984] 2 A11 E.R. at 574; 28 U.S.T. 236 (1976). By coincidence, the record of this case contains a declaration submitted by the Department of Justice with respect to another defendant, p. 1a, *infra*, that *acknowledges* that without such an amendment, there is an "obvious failure" of such a treaty to cover these offenses.

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[8] The long string of cases cited at G. Br. 11-12 have to do with the different issue of whether an offense is a crime in both countries, not whether U.S. law recognizes an offense as covered by the treaty. Some of them deal with both issues, and when they do, they of course consider and decide the question of treaty coverage as a matter of U.S. law. See, *e.g.*, *Demjanjuk* v. *Petrovsky*, 776 F.2d 571, 579 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

III. "RESTITUTION" TO A NON-VICTIM.

The Government asserts that Roger Vanden Stock, to whom the court ordered petitioner to pay over $458,000, was "a defrauded victim who was named in the indictment, specified in the jury instructions, and whose loss from petitioner's fraud was clearly demonstrated at trial." G. Br. i. The record and undisputed testimony of Vanden Stock himself and other Government witnesses was: (1) He was not named in the indictment, R. 1-6;[9] (2) He was never mentioned in the jury instructions except once in passing as a "witness," R. 12/13/85 3470; (3) He himself testified at trial that he suffered no loss at all, R. 607, 687, 696, 781-82, 970-71. Whether it is permissible under 18 U.S.C. § 3651 to award "restitution" to a non-victim except as a plea bargain is a question never resolved by this Court. Six Circuits have held that it is not; the Ninth Circuit here allowed it.[10]

IV. PROBATION WITH "NO PROBATIONARY PURPOSE" AND CONTRARY TO LAW.

1. The District Court's requirement that petitioner "shall not leave the United States until restitution is paid," Pet. Cert. 36a, stands in counterpoint to the same district court's finding that

> "no further probationary purpose is to be served by retaining defendant Van Cauwenberghe in the United States," Pet. Cert. 38a,

and that he "has relinquished control of sufficient assets to pay the full restitution ordered in this case in due

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[9] The Government elsewhere states correctly, as did the Ninth Circuit, Pet. Cert. 7a, that the charge was that petitioner "participated with two American citizens in a scheme to defraud a Belgian stockbroker and a Belgian corporation." G. Br. 2.

[10] The Third Circuit in *United States* v. *Sleight*, 808 F.2d 1012, 1019 (3d Cir. 1987), relied on at G. Br. 15, said it was adopting a "broader conception . . . than has been accepted in other circuits." The other two cases the Government cites, also from the Third and Ninth Circuits, were plea bargains. *United States* v. *Woods*, 775 F.2d 82 (3d Cir. 1985); *United States* v. *Whitney*, 785 F.2d 824 (9th Cir. 1986).

course." Pet. Cert. 37a. The very cases the Government cites make clear that a probation with no probationary purpose is—not surprisingly—invalid. See, *e.g.*, *Higdon* v. *United States*, 627 F.2d 893 (9th Cir. 1980).

2. The Government's proposal that petitioner after two remands and three unsuccessful efforts in the District Court already, see, *e.g.*, pp. 5a-6a, *infra*, should keep trying for relief from the Ninth Circuit, forgets that his claim all along was that the exile condition was unlawful on its face under federal statutes and the Constitution; in remanding, the Ninth Circuit denied the relief he sought and erroneously treated it as a matter of trial court discretion.

3. The Government asserts that "Petitioner advises that the district court on remand has made a new finding" that the assets may not be sufficient to pay the restitution order, and cites "See Pet. 9." We defy anyone to read the cited page (or any other) and discover any such thing. No such "new finding" exists. The District Court's findings never changed (in fact with the dollar's drop the property's value has increased). The Government knows this very well. Yet its brief offers such misinformation to this Court, while obliquely disowning responsibility for doing so.[11]

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[11] The Government's statement of facts (which relies mainly on citations to the Government's own brief in the court below) is also full of plain misstatements of the record. For instance, it asserts that Roger Biard lent $1 million to petitioner, G. Br. 2; the record shows without dispute that the loan was to a partnership wholly controlled by Alan Blair, R. 367, 385, 387, 389 and G. Ex. 3, and that the District Court found, "I have held that any representation made to Mr. Van Cauwenberghe is not to the partners because he wasn't a partner." R. 871. The brief asserts that "the Vanden Stock family" owned a corporation that bought an interest in property from the partnership, G. Br. 2; the record shows by the undisputed testimony of government witnesses that the corporation was owned by another corporation that was wholly owned by Constant Vanden Stock alone. R. 556-57, 584, 779-81, 825, 970. The brief states that petitioner made two payments on the Biard loan, G. Br. 2; the record shows without dispute that Blair's wife made

V. RELATION TO NO. 87-336.

This Court has already granted certiorari in the civil companion case, *Van Cauwenberghe* v. *Biard*, No. 87-336. The Government repeatedly cites that case as relevant here. See G. Br. 10, pp. 1-2, *supra*. It is, although for different reasons. It and this case each calls for examination of the proper application of *United States* v. *Rauscher*, 119 U.S. 407 (1886), and the treaty with Switzerland—there in the civil context and here in the criminal. That complementary legal inquiry, plus the judicial economy from a single set of underlying facts, make it all the more appropriate to grant certiorari and set the two cases for argument in tandem.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted,

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January 7, 1988

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them, R. 363, and the Government's own witnesses testified that "Wilfried Van Cauwenberghe never had anything to do with" the payments. R. 814; see also R. 816-17, 910-12.

APPENDICES

APPENDIX A

(Record 144-45)

DECLARATION OF MURRAY R. STEIN

I, Murray R. Stein, do hereby declare that:

(1) I am the Associate Director of the Office of International Affairs, Criminal Division, U.S. Department of Justice. I have been so assigned since the office was created in 1979. Prior thereto I handled international criminal matters for the Department while assigned to other offices within the Criminal Division. For almost twenty (20) years, I have been involved in extradition matters for the United States Government.

(2) During this period, I have contributed on behalf of the Department of Justice in the drafting as well as in negotiations for a number of extradition treaties. I participated, as then permitted by the Department of State, in preparations for the United States-United Kingdom Treaty of Extradition 28 U.S. 227 (1977). I also reviewed the treaty on the behalf of the Department of Justice in order to advise the Department of State whether we could support ratification of the treaty.

(3) I recommended, and the Department of Justice agreed, that it could not support the extradition treaty with the United Kingdom as signed. Among the difficulties that we advised the Department of State was the obvious failure of the treaty's provisions to provide for the extradition of numerable federal offenses including those involving mail and wire fraud and the Travel Act (18 U.S.C. §§ 1341, 1343 and 2314 respectively).

(4) The failure by the Department of Justice to support the treaty caused the Department of State not to forward the treaty to the Senate for ratification and to reopen negotiations with the British.

(5) Although the Department of Justice also did not participate in the reopened negotiations, its proposal became the protocol to the treaty. It was understood by the Department of Justice, and accepted as correct by the Department of State negotiator, that the language in the protocol would eliminate all concerns of the Department of Justice that federal offenses such as 18 U.S.C. §§ 1341, 1343, and 2314 would not be extraditable. It was the understanding of the Department of Justice that the so-called "transportation" clause would be viewed by the British as eliminating an impediment to surrender for extradition of offenses for which the United States had been unsuccessful under the provisions of the existing treaty—e.g. mail and wire fraud, and Travel Act.

(6) Upon acceptance by the British of the protocol and its incorporaiton into the signed treaty, the Department of Justice advised the Department of State that it would support ratification of the treaty. The amended treaty was thereafter forwarded to the Senate for its approval and subsequently the President announced that it had entered into force.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 18th, 1985.

/s/ Murray R. Stein
MURRAY R. STEIN
Department of Justice

APPENDIX B

DISTRICT OF COLUMBIA) ss.:

AFFIDAVIT OF WILLIAM L. GRAY

William L. Gray, being first duly sworn, declares and says as follows:

1. I am a professional translator competent in the French and English languages and licensed to do business in the District of Columbia.

2. For the French text that follows (from page 11 of the decision of the Swiss Federal Tribunal in *Van Cauwenberghe*, No. A 214/85, Sept. 25, 1985):

> a) Selon la demande, le recourant est accusé d'avoir, avec la complicité d'au moins deux individus de nationalité américaine, obtenu une somme totale de 3,6 millions de dollars de financiers belges, devant lesquels il aurait fait miroiter la réalisation d'une affaire immobilière qu'il n'était manifestement pas en mesure de conclure. De tels faits constituent une escroquerie d'argent ou d'autres biens au moyen de fausses allégations, délit mentionné sous ch.6 de l'art. II du Traité.

the following is the correct English translation:

> a) According to the request, the petitioner is accused of having, with the complicity of at least two individuals of American nationality, obtained a total sum of 3.6 million dollars from Belgian financiers, to whom he allegedly touted the realization of a real estate transaction which he was obviously not in a position to complete. Such facts constitute a defrauding of money or other goods by means of false pretenses, a crime mentioned under section 6 of article II of the Treaty.

3. The word "scheme" or its equivalent nowhere appears in the second sentence of French text quoted above.

/s/ William L. Gray
WILLIAM L. GRAY

Subscribed and sworn to
before me this 6th day of
January, 1988:

/s/ Moira E. Ricketts
Notary Public [SEAL]

My Commission Expires February 14, 1988

APPENDIX C

TRANSCRIPT OF PROCEEDINGS

United States v. *Wilfried Van Cauwenberghe*
No. CR 84-963-AAH (U.S.D.C., C.D. Cal.)
October 5, 1987

THE CLERK: Case Number CR-84-963, USA v. Wilfred Van Cauwenberghe. Counsel, your appearances, please?

MR. ARTERBERRY: Good afternoon, John Arterberry for the United States.

MR. KESTER: Good afternoon, Your Honor. John Kester for the defendant.

THE COURT: All right. The only question before the Court is: will I modify the conditions of probation? And if Van Cauwenberghe doesn't want what the Govment wants, I don't see why I should modify it; but I'll hear from counsel.

MR. KESTER: Your Honor, we are before the Court based on findings made by the Court previously and approved by the Court of Appeals. It is our contention that the condition is an illegal condition. We believe that on strictly the basis of humanity, that this man who has been away from his family for three years ought to be able to go home.

THE COURT: I made that order on condition that he guarantee the payment of his fine and restitution, and now he won't do it.

MR. KESTER: And he has done it, Your Honor.

THE COURT: He hasn't done it.

MR. KESTER: He has transferred title to me and to the prosecutor—to the attorney for the United States. He cannot dispose of those assets at all.

THE COURT: He wants you to transfer yours to the Clerk. That's what's happened.

MR. KESTER: That's what the Government wants.

THE COURT: You don't want to give it up. You have some money involved or something.

MR. KESTER: I have no authority to give away a million dollars of my client's money like that.

THE COURT: Then you don't get it. Motion denied. Simple as that. Take it up on appeal if you want to, and stop bothering us with these motions, because you won't do what's required; namely, guarantee the payment of the fine and the restitution, which consists of one million dollars. If you don't want to give it up, too bad. You don't get any reduction or change in the conditions of probation.

MR. KESTER: Your Honor, I believe we have done everything that is legally—

THE COURT: I believe you haven't. You've had a chance to turn that money over, and you don't do it.

MR. KESTER: We have done what we can. We can do no more. This is an illegal sentence. This is a harsh sentence.

THE COURT: No, it is not.

MR. KESTER: This is a disgraceful sentence.

THE COURT: It is not. I think you're disgraceful for saying that. You're disgusting. If you keep it up, I may levy sanctions on you, sir. All right. That's enough. Where are you from? Philadelphia? Philadelphia lawyer? I'm sick of it. All right. Motion denied. Counsel for the Government, prepare the "Order" according to Local Rule 14.

MR. ARTERBERRY: All right, Your Honor.

No. 87-703

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

WILFRIED VAN CAUWENBERGHE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Petitioner respectfully calls to the Court's attention, pursuant to Rule 22.6, a new decision of the Second Circuit noted in the most recent *U.S. Law Week*. In it, both the majority and the dissent agree that the Constitution does not permit the seizure and retention of a defendant's property that is unrelated to any crime, based merely on an indictment—*i.e.*, exactly what happened here. This brings to three the number of Courts of Appeals in conflict with what the Ninth Circuit in the present case allowed.

In *United States* v. *Monsanto*, No. 87-1397 (2d Cir. Dec. 21, 1987), copies of which have been lodged with the Clerk, the Second Circuit (Judge Mahoney joined by Judge Cardamone), while noting analytical disagreement with other courts on other points, held that the Fifth Amendment requires that "[i]f the government cannot demonstrate the likelihood that a jury would find the assets to be the proceeds of crime, the interest of the defendant in using the property to retain counsel of choice should prevail." Slip op. at 665. (In the present case the Government never even attempted to claim that petitioner's property was forfeitable, but rather argued that the Government could seize it anyway in anticipation of payment of fines and restitution in the event of conviction.) The Second Circuit also stated that even when there was a statute allowing forfeiture (as there was not here),

> "we are . . . disinclined to postulate an absolute rule allowing the government to impose indigence and deprive . . . defendants of the opportunity to retain private counsel merely by obtaining an indictment." *Id.* at 660.

Judge Oakes, dissenting, would have gone further, and would not have allowed such seizure even if a hearing established likely forfeitability under a forfeiture statute. He wrote that "The Sixth Amendment is implicated not only on the individual level of the particular defendant, but also on the institutional level of the criminal justice system as a whole." *Id.* at 669. He concluded that seizure of a defendant's property needed to pay counsel "shakes the very foundations of our criminal justice system." *Id.* at 673.

CONCLUSION

For the reasons stated here and previously, certiorari should be granted. In order that the case may be heard in tandem with No. 87-336, petitioner would request a slightly accelerated briefing schedule if necessary to permit argument this Term.

Respectfully submitted,

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January 14, 1988

NO.
87-703

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

WILFRIED VAN CAUWENBERGHE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DO THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PERMIT THE GOVERNMENT TO SEIZE PRIOR TO TRIAL, AND THEREAFTER TO RETAIN, A DEFENDANT'S PRIVATE PROPERTY THAT IS UNRELATED TO ANY OFFENSE AND IS NEEDED TO PAY COUNSEL TO DEFEND AGAINST CRIMINAL CHARGES?

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BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

INTEREST OF AMICUS [1]

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership comprised of more than 5,000 lawyers and law professors from every state, most of whom are engaged actively in defending criminal prosecutions and protecting individual rights. NACDL was founded 26 years ago to promote the study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of criminal defense lawyers and criminal justice professionals. Throughout NACDL's history, its members have

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[1] Both Petitioner and Respondent have consented to the filing of this brief. The letters of consent will be forwarded to the Clerk.

worked to protect the rights and liberties of those accused of criminal offenses, and to promote the fair and proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights, the improvement of the criminal law, and the preservation of the integrity, independence, and competence of the defense lawyer in criminal cases.

The broad issue raised in this case involves the pretrial seizure and restraint, and the potential for forfeiture of assets which an accused in a criminal case desired to use to retain counsel to defend him. Such practices by the government, which have the effect of separating a defendant from the only means whereby criminal charges can be fought, threaten fifth and sixth amendment rights of persons accused of crimes and tear at

the very fabric of our adversary system of criminal justice. Resolution of this asset seizure issue has a profound impact upon the administration of criminal justice in the courts and, therefore, upon the members of NACDL. Because the right to counsel and the preservation of an adversarial system of criminal justice are matters central to the administration of justice, NACDL has moved for leave to file this brief as amicus curiae solely to assist the Court in resolving this important issue.

SUMMARY OF THE ARGUMENT

Succinctly stated, this case raises the issue of a court's power to deprive a criminal accused of legitimately earned assets which are needed to pay defense counsel and the expenses associated with a defense to criminal charges. Although the case arises out of a claim of a court's

inherent authority to hold a defendant's assets for ultimate forfeiture or for the guarantee of restitution to a victim, the result reached in the case applies to any type of pretrial asset seizure in criminal cases. The consequences of the seizure and restraint approved by the Ninth Circuit have a profound effect on the workings of the criminal justice system. The Ninth Circuit unnecessarily has compromised an accused's constitutional rights to effective assistance of counsel, to due process, and to fundamental fairness, in a manner which conflicts with virtually every reported appellate decision on the subject of seizure and forfeiture of assets needed to pay legal fees. The Ninth Circuit decision will have serious and far reaching ramifications for the criminal justice system.

The pretrial seizure and retention of an accused's assets, especially those which are unconnected to any criminal activity, raise serious constitutional questions. When untainted assets are needed by an accused to retain counsel and pay legal fees to defend against criminal charges, the constitutional question becomes even more pronounced. Until criminal charges against an accused are resolved, and the property which is subject to seizure or forfeiture is determined to be derived from illegal conduct, the accused should not be made to suffer from an inability to use assets to pay counsel for the purpose of mounting a vigorous defense. Every accused has the right to a meaningful defense and the assistance of counsel to pursue defenses, no matter how serious the criminal allegations. This right becomes nothing

but an illusion if an accused can be separated from assets prior to a judicial determination of guilt, and thus can be denied the right to use assets for defense purposes.

The rendering of legitimate legal services to a criminal accused is entirely consistent with constitutional interests, and is a right which must be protected. That right was abandoned by the Ninth Circuit in the case under review, in a manner which does substantial injustice to the criminal justice system. Certiorari review by this Court is needed to correct this imbalance in the law.

Within the framework of our justice system, the pretrial separation of an accused from assets can occur in several ways. The most frequently occurring method is through statutory seizure and forfeiture. The Comprehensive Forfeiture

Act of 1984[2/] contains forfeiture provisions which vest in the government the title to property derived from criminal conduct from the time of an accused's unlawful acts. This "relation back" doctrine is a vehicle by which government authorities argue that an accused cannot transfer assets to a third party because the assets become the property of the government at the moment of the criminal activity. This statute has been the subject of recent judicial examination. The propriety of seizure and forfeiture

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2/ The Comprehensive Forfeiture Act was enacted as Chapter III of the Crime Control Act of 1984. P.L. No. 84-873, §§301-322, 98 Stat. 1837 (1984). The Act amended existing provisions of the RICO and CCE statutes an attempt to make them more effective. See Fossum, Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up For Grabs? 39 Sw.L.J. 1067, 1068 n.10 (1986); Rachner, Against Forfeiture of Attorneys' Fees under RICO: Protecting the Constitutional Rights of Criminal Defendants, 61 N.Y.U.L.Rev. 124, 125-126 (1986).

under the CFA requires a careful balancing of an accused's constitutional rights against the government interest in holding assets for ultimate forfeiture.

Another approach to property seizure and forfeiture, the one used in this case, involves a taking of property based on a court's inherent authority to hold property for forfeiture purposes, even when the property concededly is not derived from criminality. The initial justification for the taking, that a court possesses authority to deprive a criminal defendant of access to lawfully owned property, is suspect, since due process protections severely limit the power of a court to deprive a person of property. But, even if a court has such power, that authority cannot be so broad as to prevent a criminal defendant from using assets to retain counsel and defend

against the charges. In either approach, the pretrial seizure of property, without a judicial determination of an accused's guilt beyond a reasonable doubt and a finding that a valid basis exists for forfeiture, compromise the accused's constitutional guarantee of the right to the assistance of counsel and fundamental fairness.

The Ninth Circuit decision for which review is sought authorizes a seizure of an accused's assets, even when that seizure has been shown to compromise the accused's ability to retain counsel to pursue an aggressive and vigorous defense. This authority granted to the government to seize and retain assets, without any guidelines for judicial review, conflicts with recent decisions of other federal courts, and results in such uncertainty in the application of the forfeiture laws

that this Court should resolve the conflict and clarify the ambiguity. The forfeiture authority of the courts is an integral facet of the criminal justice system. To be effective, the forfeiture laws must be uniform throughout the criminal justice system. That necessary uniformity is nonexistent now, in view of the conflicting decision of the Ninth Circuit.

The view of asset seizure and forfeiture approved by the Ninth Circuit works a serious injustice to a criminal accused who intends to challenge the prosecution's charges. The interpretation successfully pressed by the government tears at the very fabric of our adversarial system of criminal justice. The decision of the Ninth Circuit violates precedent, is inconsistent with the meaning of pretrial seizure and forfeiture laws, and runs

afoul of the constitutional guarantees to the assistance of counsel, due process, and fundamental fairness. The application of pretrial seizure, restraint, and forfeiture laws should be uniform throughout the criminal justice system. Because the Ninth Circuit's decision promotes disharmony within the system, this Court should grant certiorari review to resolve the now-existing conflict.

REASONS FOR GRANTING THE WRIT

ALLOWING THE GOVERNMENT TO SEIZE PRIVATE PROPERTY PRIOR TO TRIAL AND THEREAFTER TO RETAIN THAT SAME PROPERTY WHICH IS UNRELATED TO THE CHARGED CRIMINAL OFFENSE AND IS NEEDED TO PAY COUNSEL VIOLATES THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The power of the government to seize an accused's assets, and the authority of a court to deprive the accused of access to those assets, even when needed to pay

legal fees, are issues of considerable concern to the criminal justice system. Resolution of these issues by the lower courts has been nearly uniform, with the general rule that pretrial seizure and deprivation of assets cannot be effected in so broad a manner that an accused is denied access to funds needed to defend against criminal charges. Those decisions, whether resolved on the basis of constitutional analysis or statutory construction, recognize that a delicate balance was required to insure that an accused not be deprived of the minimum requisites to challenge government authority. In United States v. Van Cauwenberghe, 827 F.2d 424 (9th Cir 1987), the Ninth Circuit altered this constitutionally sound approach, and permitted the unbridled seizure of assets and deprivation of an accused's access to

those assets, notwithstanding the accused's substantial showing of need.

Criminal seizure of an accused's personal property for purposes of obtaining forfeiture of assets derived from or used in the commission of criminal activity is of relatively recent vintage. Present day pretrial property seizures and forfeitures in criminal cases essentially began in 1970, when Congress enacted two laws designed to combat what was viewed as the pervasive influence of organized crime.[3/] Both laws, the Racketeer Influenced and Corrupt Organizations Act

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3/ Mass, Forfeiture of Attorneys' Fees: Should Defendants Be Allowed to Retain the "Rolls Royce of Attorneys" with the "Fruits of Crime"? 39 Stan.L.Rev. 663, 667-668 (1987) (historical overview of criminal forfeiture provisions).

(RICO)[4] and the Continuing Criminal Enterprise statute (CCE),[5] contain provisions permitting the forfeiture of property belonging to a convicted defendant.[6] The enactment of these laws was

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4/ 18 U.S.C. §§ 1961-1968. Organized Crime Control Act of 1970, §901(a), Pub.L. 81-452, 84 Stat. 922.

5/ 21 U.S.C. §848. Comprehensive Drug Abuse Prevention and Control Act of 1970, §408, Pub.L. 91-513, 84 Stat. 1236.

6/ A criminal forfeiture is an in personam penalty against the defendant, and functions as a punishment imposed on a guilty defendant. United States v. Lizza Industries, Inc., 775 F.2d 492, 498 (2d Cir. 1985); United States v. Conner, 752 F.2d 566, 576 (11th Cir.), cert. denied, 106 S.Ct. 725 (1985). See Russello v. United States, 464 U.S. 16, 104 S.Ct. 296 (1983) (discussion of criminal forfeiture pursuant to the RICO Act). This penalty differs from the typical in rem forfeiture, which proceeds against the property itself as the offender. United States v. L'Hoste, 609 F.2d 796, 813 n.15 (5th Cir.), cert. denied, 449 U.S. 833 (1980). See Reed, Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes, 22 Am.Crim.L.Rev. 747 (1985) (examination of civil versus criminal forfeiture laws).

necessary because there is no inherent authority to seize or forfeit an accused's property, a point which escaped the Ninth Circuit in the decision below.

Congress stiffened the RICO and CCE pretrial seizure and forfeiture provisions in 1984. Even with the strengthened statutes, seizures and forfeitures of a defendant's assets were not permitted to violate constitutional protections. The principal thrust of the amendments, contained within the Comprehensive Forfeiture Act of 1984, was that legal ownership to property derived from unlawful activity vests in the government at the time of the criminal act. 18 U.S.C. §1963(c); 21 U.S.C. §853(c). This concept, known as the "relation back" doctrine, authorizes the government to request that a court void post-crime third-party transfers of defendant's

assets. See Payden v. United States, 605 F.Supp. 839, 849 n.14 (S.D.N.Y.), rev'd on other grounds, 767 F.2d 26 (2d Cir. 1985).7/ The CFA provides an exception to the relation back doctrine, in that a bona fide purchaser without actual or constructive notice that the property was subject to forfeiture is allowed to acquire title. 18 U.S.C. §1963(c); 21 U.S.C. §853(c).

To prevent a defendant from disposing of illegally acquired assets prior to conviction, the CFA permits pretrial orders restraining the defendant's property. 18 U.S.C. §1963(e); 21 U.S.C. §853(e). The issuance of a broad restraining order prevents any transfer of the defendant's assets until the forfeiture question is resolved at the con-

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7/ Prior to the CFA, the relation back theory was not applicable to criminal forfeitures. See United States v. Ginsburg, 773 F.2d 798, 800 (7th Cir. 1985), cert. denied, 106 S.Ct. 1186 (1986).

clusion of the criminal trial. In the interim, the defendant can be denied access to the restrained assets, but only upon a substantial showing of good cause.

The inherent conflict in the application of pretrial seizure and forfeiture authority is that found in the present case: can an accused be separated from legitimately owned assets prior to a determination of guilt, even when those assets are needed to support a defense to criminal allegations? The courts which have considered this question have largely concluded that the Constitution requires that a balance be struck, and that otherwise lawful government aims cannot usurp an accused's right to counsel. It is in this regard that the Ninth Circuit failed to pay heed to the priorities protected by the Constitution. This is

the conflict which must be resolved by this Court.

The essential friction between government interests and individual rights found in this case is that which pits a defendant's right to an aggressive defense against the government's interest in holding property for ultimate forfeiture or to satisfy conditions of a defendant's sentence, such as the payment of a fine or restitution. The laudable government purpose of protecting assets against wrongful transfer or waste cannot be elevated to an absolute requirement, when those very assets are needed to insure a defendant's right to the effective assistance of counsel. It makes no difference from a constitutional perspective whether the property restraint stems from a statutory enactment or from judicial approval, since the restriction

on the right to counsel is just as evident. In failing to recognize this impermissible restriction, the Ninth Circuit failed to reconcile its decision with analogous opinions of other courts.

An early analysis of government action toward attorney fee forfeitures occurred in United States v. Rogers, 602 F.Supp. 1332, 1348 (D. Colo. 1985), where the court announced that whenever a property seizure clashes with a defendant's sixth amendment right, the property seizure must give way:

> An attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham to avoid forfeiture. Like the grocer compensated for the food he sells the defendant or the doctor paid a fee for healing the defendant's children, the lawyer is entitled to compensation for his services actually and legitimately rendered.

> Congress did not intend to include in those items forfeitable the compensation already paid for goods and services legitimately provided. This does not, however, mean that assets transferred to a lawyer as part of a sham will not be subject to forfeiture.

Using this analysis, a forfeiture grounded on statutory authority cannot be applied so broadly as to preclude arrangements for the payment of legal fees. This point was underscored in United States v. Reckmeyer, 631 F.Supp. 1191, 1196 (E.D. Va. 1976),[8/] finding that the philosophy behind the forfeiture provisions of the CFA -- separating a defendant from illegitimately earned assets -- is actually furthered by permitting the payment of bona fide legal fees:

8/ The Reckmeyer decision was affirmed in United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), which is now pending on rehearing en banc.

In this court's opinion, there is no legitimate countervailing government interest which would be served by the forfeiture of bona fide attorney's fees. The purpose of the criminal forfeiture statute is to strip racketeers and drug dealers of their "economic bases" upon conviction. See S.Rep. 98- 225 at 191; see also Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 299 (1983). The relation-back provision of Section 853(c) authorizes the court to set aside illusory or fraudulent transfers so that a defendant cannot, prior to conviction, avoid forfeiture by transferring assets to a nominee. See S.Rep. 98-225 at 209 n.47. Exempting legitimate attorney's fees from forfeiture would not undermine these purposes because "[a]n attorney who receives funds in return for services legitimately rendered operates at arm's length and not as part of an artifice or sham," United States v. Rogers, 602 F.Supp. at 1348, and therefore a defendant who is found guilty will still be separated

> completely from his economic base.

See also United States v. Reckmeyer, 628 F.Supp. 616 (E.D. Va. 1986)(post-conviction forfeiture does not bar repayment of legitimate debt).

The very potential for fee restraints in connection with property seizures has a negative impact on the adversary system of justice, an effect not envisioned by the Ninth Circuit in its decision below. Pretrial restraints and fee forfeiture may force the withdrawal or disqualification of defense counsel for financial, ethical, and professional reasons. Pretrial restraints and ultimate fee forfeiture serve to allow the government to force the services of court-appointed counsel on the defendant at the government's discretion or otherwise to limit the resources available to mount a defense to the government's allegations,

as occurred in this case. Pretrial restraining orders and fee forfeitures inhibit lawyers from accepting criminal defense work, because counsel may never be compensated for the work performed.[9] Moreover, they risk violating ethical rules against accepting fees on a contingent basis.[10]

9/ "Defending RICO accusations requires the marshalling of vast quantities of information and generally requires two to three years of representation during grand jury investigations." Mass, Rolls Royce of Attorneys, 39 Stan.L.Rev. at 675 n.74.

10/ A research study conducted by Prof. William J. Genego of the University of Southern California Law Center concluded that prosecutorial practices such as attorney fee forfeitures and attorney subpoenas are increasing, at the risk of chilling the relationship between lawyer and client, and jeopardizing the availability of criminal defense practitioners. Genego, Risky Business: The Hazards of Being A Criminal Defense Lawyer, 1 Criminal Justice 2 (Spring 1986); Genego, Reports from the Field: Prosecutorial Practices Compromising Effective Criminal Defense, 10 The Champion 7 (May 1986). Cloud, Forfeiting Attorney's Fees: Applying An Institutional Role Theory To

(continued...)

In United States v. Ianniello, 85 Cr. 115 (CBM) (S.D.N.Y. Sept. 3, 1985)(Westlaw), then Chief Judge Constance Baker Motley concluded that laws permitting pretrial restraint of assets and ultimate forfeiture of funds needed to pay defense counsel could not encompass legitimate legal fees without risking insoluble constitutional conflict.

In the course of ruling on a motion to quash a grand jury subpoena, another court stated that the issue of property restraint and its impact on payment of legal fees "would raise such constitution-

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10/ (...continued)
Define Individual Constitutional Rights, 1987 Wisconsin L.Rev. 1 (1987). See also Model Code of Professional Responsibility DR 2-110(C). An attorney can withdraw from representation when the client "[d]eliberately disregards an agreement or obligation to the lawyer as to expenses or fees," or if "[h]is continued employment is likely to result in a violation of a Disciplinary Rule." Id. DR 2-101(c)(1)(f), DR 2-110(c)(2).

al and ethical problems, I cannot conceive that this was intended by Congress, absent some indication in the statute or legislative history," and concluded that the possibility of fee forfeitures "would in all likelihood violate the Sixth Amendment." United States v. Badalamenti, 614 F.Supp. 194, 196 (S.D.N.Y. 1985). It is apparent, then, that the courts which have analyzed the issue of property seizures or restraints which restrict the payment of legal fees have concluded that assets needed to pay for bona fide attorneys fees are not forfeitable and should not be the subject of restraining orders. E.g., United States v. Bassett, 632 F.Supp. 1308 (D. Md. 1986); United States v. Reckmeyer, 631 F.Supp. 1191 (E.D. Va. 1986).11/ The

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11/ For a summary of the various district court rulings on asset restraints and fee forfeitures, see "Defense Attorneys Get Break," Miami Review at 1 (continued...)

conclusion is inescapable: the defendant's right to counsel, which is implemented through the ability to pay bona fide legal fees, should not be denied because of the government interest in seizing a defendant's assets.

The sixth amendment to the Constitution guarantees to an accused the right to be represented by counsel in all criminal cases. This right to counsel enables a defendant to implement all constitutional guarantees necessary for a fair trial. See United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 2044 (1984).12/ The sixth amendment guarantees

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11/ (...continued)
(July 31, 1986); Fossum, Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys' Fees Up For Grabs?" 39 Sw.L.J. 1067, 1079 n. 89 (1986).

12/ The sixth amendment right to counsel includes the right to effective assistance of competent counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

to a defendant a qualified right to counsel of choice if the defendant can afford counsel. E.g., United States v. Curcio, 694 F.2d 14, 22-23 (2d Cir. 1982); United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

As this case illustrates, the right to choose counsel is of great practical significance. Here, the accused attempted to choose counsel to represent him in a complex criminal case. The retention of counsel decision necessarily encompassed the view that counsel would devise a complete defense strategy to fight the criminal charges. Because of the limitations imposed by the government's pretrial seizure and the court's pretrial order denying access to assets, the accused had no access to those assets needed for use in retaining counsel of his choice who

could mount a defense in the manner intended. That ruling itself requires an examination by this Court.

A defendant's constitutional right to present his defense through chosen counsel outweighs the government's financial interest in protecting a possible claim of title to property. Any other conclusion would elevate the government's monetary interests above the defendant's basic constitutional right to an effective defense. It is the potential for conviction and ultimate asset forfeiture that casts a negative gloss on the ability to retain counsel. The chosen lawyer is placed in an unnecessary environment of having to weigh effective representation against entitlement to legal fees. The government should not be able to place counsel in a position where personal interests and those of the client may

conflict. Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980)(conflict of interest jeopardizes sixth amendment right to counsel). Sixth amendment interests can be effected only by removing all unnecessary hurdles to counsel's ethical dedication to the client's case.

The constitutional concerns have been resolved by other courts in favor of the position advanced by amicus curiae. The most recent appellate decision involving the application of pretrial seizure and restraining orders to assets needed to pay bona fide attorneys' fees for criminal defense representation is United States v. Harvey, 814 F.2d 905 (4th Cir. 1987).13/ During proceedings in the lower tribunal,

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13/ Harvey involved a consolidated appeal of pretrial restraining and forfeiture orders in three separate cases. The Fourth Circuit granted rehearing en banc in one of the cases, in which attorneys fees were exempted from forfeiture.

the district court entered an ex parte pretrial order which restrained the defendant from using assets to pay legal fees to defense counsel, but used the Criminal Justice Act to appoint as counsel two members of the law firm which Harvey had wanted to retain. Harvey appealed his resulting conviction, raising the issue of the propriety of the pretrial restraining order. The Fourth Circuit consolidated Harvey's case with government appeals from district court orders in United States v. Bassett, 632 F.Supp. 1308 (D.Md. 1986),[14]

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[14] In United States v. Bassett, the court granted a pretrial injunction against a government threat of forfeiture of legitimate fees. The court held that "Congress did not intend the statute to encompass fees to attorneys paid for the legitimate rendering of professional services," for to do so would "violate Sixth Amendment principles." 632 F.Supp. at 1317-18.

and United States v. Reckmeyer, 631 F.Supp. 1191 (E.D. Va. 1986).15/

The Fourth Circuit affirmed Harvey's conviction, holding that the challenges of ineffective assistance of counsel caused by the restraining order were not the proper subject of a direct appeal. Those matters, instead, would have to be raised by collateral attack under 28 U.S.C. §2255. In so ruling, the Fourth Circuit held that Harvey's rights to procedural due process had been violated by the manner in which the asset freeze occurred. The court also upheld the orders in

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15/ In United States v. Reckmeyer, the issue was raised by defense attorneys after a guilty plea and sentencing. The court held that forfeiture of bona fide fees violated the sixth amendment by impairing the defendant's right both to obtain counsel of choice and to the effective assistance of counsel. 631 F.Supp. at 1196-98. The government was directed to pay defense counsel out of the defendant's forfeited assets. 631 F.Supp. at 1198.

Bassett and Reckmeyer, which had exempted bona fide legal fees from forfeiture. The rationale for the court's ruling was plain, 814 F.2d at 909:

> We hold that the Act was intended by Congress to permit such pre-conviction restraints on transfer and ultimate forfeiture of property legitimately contracted to be paid as attorney fees, but that such an application violates the qualified right to counsel of choice secured by the sixth amendment. We further hold that the post-indictment ex parte restraints on property transfers, as permitted by the Act, violated fifth amendment procedural due process rights where no opportunity for an early post-restraint hearing is afforded but that here the error of entering such an order was harmless and, in any event, no basis for reversing the conviction.

Harvey quite clearly concluded that legitimate, arms length, legal fees intended for the defense of criminal

charges are protected by the Constitution, 814 F.2d at 926:

> In sum, we hold that to the extent the Act authorizes freeze orders and property forfeitures whose effect is to deprive an accused of the ability to employ and pay legitimate attorney fees to private counsel to defend him against charges underlying the forfeiture, such applications violate the sixth amendment right to counsel of choice.

The Harvey analysis comfortably resolves the conflict, found in the instant case, between a defendant's constitutional right to counsel, due process, and fundamental fairness, on the one hand, and the government's broad interest in crime prevention, on the other hand. In the pretrial context, at a time when the accused is presumed innocent and is entitled to the benefit of counsel to mount a vigorous defense to the criminal allegations, the balance properly rests

with the accused, such that assets needed to mount a defense or pay legal fees "may constitutionally be forfeited or restrained from transfer only when and to the extent the fee transaction was a sham or fraudulent one..." Id. at 929. The government interest is satisfied under this analysis, because the government is entitled to seek the restraint and forfeiture of assets involved in sham transactions and also is empowered to demonstrate that sufficient untainted resources exist which are adequate to satisfy the demands of the attorney-client relationship. Id. at 927-928.

Another appellate decision which conflicts with the Ninth Circuit case under review is United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), on rehearing, 809 F.2d 249 (5th Cir. 1987), where the Fifth Circuit invalidated a pretrial

order prohibiting the payment of the defendant's attorneys' fees. Reversing the district court's restraining order, the Fifth Circuit stated, at 1474:

> We agree with the Bassett, Ianniello, Reckmeyer, Badalamenti, and Rogers courts that the defense attorney's necessary knowledge of the charges against his client cannot defeat his interest in receiving payment out of the defendant's forfeited assets for legitimate legal services.... We see no indication in the statute or legislative history that Congress intended to exclude attorneys from bringing a third-party claim for a reasonable attorney fee against potentially forfeitable assets in a post-conviction hearing.

In so holding, the court noted that it was not establishing a blanket prohibition against similar pretrial restraints. There exist two potential avenues for district courts when addressing the question of pretrial restraining orders:

(1) an attorney fee exemption from pretrial restraint; or (2) a post-conviction hearing where counsel could line up with other creditors and demonstrate the bona fide nature of the claim for legal fees.16/ Choosing a particular alternative requires a balancing of interests:

> Defendant's interest in obtaining counsel of choice and the possible adverse effects of a pretrial refusal to exempt defense counsel's fees from forfeiture are factors that the district court must consider in exercising its discretion to grant a pretrial injunction that restrains the defendant's assets until conclusion of trial.

Pretrial seizure of assets needed for defense of criminal charges places the defendant in a difficult quandary. How can the defendant prevail against the

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16/ See also United States v. $10,694, 828 F.2d 233 (4th Cir. 1987)(subjective knowledge requirement in civil forfeiture).

charges if the government deprives him of the tools needed to accomplish that? How does the defendant prove that the resources to pay counsel should not be restrained because they are from legitimate sources? Even when that is done, as shown in the present case, can a court order still deprive the defendant of access to the property, and thus deny the ability to pay counsel? The gain to the government merely by engaging in a pretrial seizure of assets or obtaining a restraining order is that the accused is left powerless to defend against the charges. The Ninth Circuit's allowance of that result severely conflicts with the constitutional principles discussed herein.

Constitutional considerations of due process guarantee that criminal proceedings will be fundamentally fair.

See Estelle v. Williams, 425 U.S. 501, 505 (1976); Powell v. Alabama, 287 U.S. 45, 63 (1932). Allowing the pretrial seizure and restraint of assets needed to pay legal defense expenses denies due process to the accused. The Rogers court recognized this danger when it exempted legal fees from the ambit of statutory forfeitures. 602 F.Supp. at 1350.

Our system of justice is predicated on the reality that the vigorous assertion of a defendant's rights "will best promote the ultimate objective that the guilty be convicted and the innocent go free." United States v. Cronic, 466 U.S. 648, 104 S.Ct. at 2045 (1984)(quoting Herring v. New York, 422 U.S. 853, 862 (1975)). The government's interest in barring the use of assets for the defendant's defense simply cannot outweigh the constitutional preference for liberty until guilt is

certain. See In re Winship, 397 U.S. 358, 362-64 (1970).

Our adversary system demands that the government prevail only by proving its allegations, not by undercutting an accused's ability to mount a defense. In the former situation, the public perception is that trials are fair. In the latter case, the public will come to question the integrity of our justice system. Our courts have worked hard for generations to foster public acceptance of the rule of law. Forfeiture of fees is inconsistent with the fairness which people expect from our justice system.

The NACDL supports the efforts to take the profit out of crime. The approach used, however, must be consistent with our constitutional system of justice. Restraining a defendant's assets is incompatible with these constitutional

considerations. By enabling the government to restrain assets and thus prevent effective representation by counsel, the Ninth Circuit favored the enormous power of the government against an unprotected defendant. Where fundamental liberties are at stake, as in the pretrial seizure and restraint of assets, the government interest must be deemed secondary.

The decision of the Ninth Circuit has altered the delicate balance between law enforcement interests and an accused's right to challenge government accusations. The result reached by the Ninth Circuit undermines the beneficial policy underlying the right to effective assistance of counsel. The Ninth circuit decision threatens the uniformity necessary for the effectuation and application of the criminal laws in just manner.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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